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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No.

79-476

MICHIGAN OIL COMPANY, A MICHIGAN CORPORATION,
Petitioner,

vs.

NATURAL RESOURCES COMMISSION AND SUPERVISOR
OF WELLS AND PIGEON RIVER COUNTRY
ASSOCIATION,

Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MICHIGAN**

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**PETITION FOR WRIT OF CERTIORARI TO THE
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Petitioner, Michigan Oil Company, which was Appellant below, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Michigan entered in this action on March 1, 1979.

OPINIONS BELOW

The decision of the Michigan Supreme Court is officially reported *sub nom. Michigan Oil Company v. Natural Resources Commission* at 406 Mich. 1, unofficially reported at 276 N. W.

2d 141 and reproduced in official form in Appendix A. The decision of the Court of Appeals of Michigan is officially reported at 71 Mich. App. 667, unofficially reported at 249 N. W. 2d 135 and reproduced in official form in Appendix E. The opinion of the Circuit Court for the County of Ingham, State of Michigan, which is unreported, is reproduced in Appendix F. The findings of fact, conclusions of law and order of the Natural Resources Commission, which are unreported, are reproduced in Appendix G. The findings of fact, conclusions of law and recommendation of the Hearing Examiner, which are unreported, are reproduced in Appendix H.

JURISDICTION

The decision of the Michigan Supreme Court was entered on March 1, 1979. The Michigan Supreme Court denied Petitioner's timely motion for rehearing on May 7, 1979. On July 30, 1979, Mr. Justice Marshall entered an Order extending the time for filing this petition for writ of certiorari to and including September 21, 1979. Jurisdiction is conferred upon this Court by 28 U. S. C. § 1257(3).

QUESTIONS PRESENTED

Petitioner is a successor in interest of an oil and gas lease covering state owned lands in the Pigeon River Country Forest (Pigeon River Forest) in the northern part of the lower peninsula of Michigan. The lease was purchased from the State of Michigan in 1968 at a public sale. In 1972, Petitioner made application to the Michigan Supervisor of Wells for permission to drill a well on the leased premises. The application was denied on July 21, 1972 and Petitioner appealed the denial to the Natural Resources Commission (NRC).

Thereafter in early 1973 an evidentiary hearing on the permit denial was held at the direction of the NRC before a hearing examiner it designated. This was the only evidentiary

hearing in the case and it was limited to the issue of whether "unnecessary" damage would occur under the surface waste definition of the Michigan Oil Conservation Act (Mich. Comp. Laws § 319.1 *et seq.*) by Petitioner's drilling of a well. Issues under the Michigan Environmental Protection Act (Mich. Comp. Laws § 691.1201 *et seq.*) were not raised. The NRC hearing examiner concluded that "unnecessary" damage was that committed by negligent operations or waste that could be prevented by precautions at the well location and that the claimed impact on the ecology (elk, bear and bobcat) was not a valid reason for refusing the drilling permit. Thereafter, however, the NRC ruled that "unnecessary" damage under the Oil Conservation Act included damage to the ecology and that such damage would occur by Petitioner's drilling. This ruling was affirmed by the courts.

Petitioner's drill site is approximately 2½ miles north of the State-Charlton 1-4 well, which was completed in June 1970 as an outstanding commercial producer. Probable reserves for Petitioner's well are estimated at 8 to 20 million barrels of oil.

The Department of Natural Resources (DNR) issued 34 drilling permits in a 2½ to 7 mile radius of Petitioner's site from the date of approval of the State-Charlton 1-4 to September 27, 1974. The hearing examiner found no significant difference between the closest locations for which those permits were granted and Petitioner's.

Following affirmance of the case by the Michigan Supreme court the DNR terminated the lease by letter dated May 8, 1979 (Appendix N), which Petitioner has protested without avail.

The questions presented are whether Respondent's denial of a drilling permit and termination of the lease are an unconstitutional taking of the value of the lease in violation of due process and equal protection under the Fourteenth Amendment and an unlawful impairment of contract in violation of Art. I, Section 10 of the Constitution of the United States; and whether

the NRC ruling after the evidentiary hearing had occurred, that "unnecessary" damage under the Oil Conservation Act included damage to the ecology, and therefore that Petitioner's drilling permit was properly refused, denied Petitioner due process by precluding any opportunity to offer rebuttal evidence.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

- (a) The Fourteenth Amendment to the United States Constitution, Section 1 of which provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

- (b) Article I of the United States Constitution, Section 10 of which provides in pertinent part:

"No State shall * * * pass any * * * law impairing the obligation of Contracts * * *."

- (c) Michigan Oil Conservation Act, Mich. Comp. Laws § 319.1 *et seq.*, which is set forth in full in Appendix O.

- (d) Michigan Department of Conservation Act, Mich. Comp. Laws § 299.1 *et seq.*, which is set forth in full in Appendix P.

- (e) Michigan Environmental Protection Act, Mich. Comp. Laws § 691.1201 *et seq.*, which is set forth in full in Appendix Q.

STATEMENT OF THE CASE

In 1968, the Michigan Department of Natural Resources (DNR) determined to offer at public sale oil and gas rights

in selected state-owned lands in the northern part of the lower peninsula of Michigan. A tentative list of the proposed areas was circulated on May 23, 1968 throughout the various DNR Divisions, for approval, objection, or the imposition of development restrictions.* (App. J, p. A124)

Restrictions or exclusions were recommended for some of the areas listed, but not for Corwith Township, the area here involved, located some 19 miles northeast of Gaylord. A revised list was then submitted by the DNR Lands Division to the same divisional heads for further review on July 11, 1968, for any further revisions or adjustments. The Region Manager, C. Troy Yoder, a 30 year DNR employee with upwards of 25 years of familiarity with the Pigeon River Forest area replied, on August 1, 1968, "No adjustments necessary." (App. J, p. A127)

The proposed lease sales were submitted to, and approved by, the DNR Deputy Director and then were sold at public sale in August of 1968. The successful bids and leases were submitted by DNR Director MacMullan to the NRC, were approved on September 5, 1968 by the NRC and were then submitted to and approved by the State Administrative Board on September 17, 1968. (App. J, p. A128)

In addition to the potential public benefits of such oil and gas exploration and development critically needed in these times of shortage, the State received \$1,122,788 in 1968 on the leases sold, in addition to the extensive royalties accruing from successful wells. (App. J, p. A128)

* The DNR personnel thus consulted included the Deputy Director of Administration, the regional managers, and the heads of the DNR Engineering Division, Fishing Division, Fire-Fighter Division, Forestry Division, Game Division, Geographical Survey Division, Lands Division, Parks Division, Recreation Resources Division, Planning Division, and Research Development Division. Such departmental heads were all veteran DNR personnel, familiar with the areas involved.

The lease here involved is reproduced in Appendix L. (pp. A175-A186) It was executed by the DNR on October 1, 1968, on the official DNR form, for a term of 10 years and "as long thereafter as oil and/or gas are produced in paying quantities." The declared leasehold purpose and authorized use of the land, as set forth in paragraph C of the lease, was:

"* * * for the sole and only purpose of drilling, boring, mining and operating for oil and gas and acquiring possession of and selling the same * * *." (App. L, p. A175)

The lease provides for payment of annual fixed rentals together with a $\frac{1}{8}$ th royalty to the State of Michigan on all gas and oil produced. By paragraph G the lease also reserved to the state the right to use the premises "for any purpose other than, *but not to the detriment of, the rights and privileges herein specifically granted * * **". (Emphasis added). (App. L, p. A185)

Paragraph H of the lease provided:

"This lease shall be subject to the rules and regulations of the Department of Conservation now or hereafter in force relative to such leases, all of which rules and regulations are made a part and condition of this lease; *provided, that no rules or regulations made after the approval of this lease shall operate to affect the term of lease, rate of royalty, rental, or acreage, unless agreed to by both parties.*" (Emphasis added). (App. L, p. A186)

Under an agreement to assign dated May 12, 1972, Petitioner is the successor in interest of a 40 acre tract covered by this lease. (App. J, p. A) These 40 acres are the southwest quarter of the southeast quarter of Section 22, Corwith Township, Otsego County, Michigan. On May 31, 1972 Petitioner applied to the DNR Supervisor of Wells for the drilling permit required by the Michigan Oil Conservation Act (Mich. Comp. Laws § 319.23; App. D, pp. A53; App. J, p. A118). The proposed site consists of approximately $2\frac{1}{2}$ acres bordering the southerly line of Section 22. The requested permit would have involved a 3 or 4 week drilling operation, followed by suitable fencing and

screening of the well-site, and routine inspection visits by a supervisor, the oil or gas, if found, to be carried off by a pipeline to be installed for that purpose. Probable reserves were estimated at 8-20 million barrels of oil. (App. J, pp. A131-A132)

The site was duly inspected by staff members of the Supervisor of Wells' Department, who reported favorably on Petitioner's application. (App. J, pp. A126-A128) However, on July 21, 1972 the Supervisor of Wells notified Petitioner that he had been directed by DNR Director MacMullan to deny the drilling permit. (App. J, p. A139)

This denial of permit was appealed to the NRC. The NRC elected not to conduct the hearing itself but appointed Frederick S. Abood, to act as hearing examiner and submit his findings of fact, conclusions of law and recommendation to the NRC. (App. J, p. A119)

By pre-trial statements filed, the hearing examiner was limited to the issue of whether the proposed well would cause "unnecessary" damage under the Michigan Oil Conservation Act.* (App. J, p. A149) On the eve of the evidentiary hearing, appellee Pigeon River Country Association was permitted to intervene but was limited to these same issues of "unnecessary" damage. Neither the DNR nor intervenor raised any issue under the Michigan Environmental Protection Act. The hearing then went forward early in 1973. (App. J, p. A119)

On October 11, 1973, the hearing examiner filed carefully documented findings of fact and conclusions of law. (App. J, pp. A119-A153) He found that Petitioner's well site was approximately $2\frac{1}{2}$ miles north of the State-Charlton $\frac{1}{4}$ well which was completed in June of 1970 as a commercial producer; that at the time of the hearing there were five producing wells in

* Section 2 provides: "'Surface waste,' as those words are generally understood in the oil business, and in any event to embrace * * * (2) the unnecessary damage to or destruction of the surface, soils, animal, fish or aquatic life or property from or by oil and gas operations; * * *." (App. O, p. A. 197)

Charlton Township, the township immediately south of Corwith Township and also in the Pigeon River Forest; that since the denial of Petitioner's permit, three permits had been issued, one in Section 19 of Corwith Township and two in Charlton Township; that all of the wells, both producing and permitted, were comparably situated to petitioner's with respect to the Black River and the Black River Swamp; that in the Pigeon River area are deer, bear, bobcat, elk and game birds; that the elk range, which includes Corwith Township, covers 600 square miles; that no unique or special wildlife habitat features are present at the well site; that the area is a scene of much activity, including camping, snowmobiling, hunting of deer, bear, bobcat, coyote, rabbit and bird, training of hunting dogs, fishing, motorcycle riding, all-terrain vehicle cruising, hiking, timber cutting, skiing, pipelines, wells and more; that there are snowmobile parking lots in the adjacent Sections of 21 and 27 of Corwith Township; and that county roads border Section 22 on three sides, a trail road is on the fourth and other trail roads within. (App. J, pp. A134-A138)

The hearing examiner found that if Petitioner's well were drilled, there would be no significant effect as to the soil, fish or aquatic life and it would not affect in any significant way deer, birds and small animals. He noted the DNR's claim was that the elk, bear and bobcat are disturbed by any human activity and that this is "unnecessary" damage. He also noted however, that, although more than two years had passed since the State-Charlton 1-4 well had been drilled, no one had made a study to determine the effect of an oil well on elk, bear and bobcat; that there was no evidence whatsoever of any such effect; but that the elk were still there sharing their range with camping, snowmobiling, hunting, timber harvesting and other uses. He concluded that it was not established that Petitioner's well would cause damage to elk, bear or bobcat; and if human presence disturbs elk, it is wide spread in the area and no one could testify that an oil well is more disturbing than snow-

mobiling, hunting, use of dog packs, commercial timber harvesting and the many other year-round activities there. The hearing examiner further found discrimination and arbitrary action in the denial of Petitioner's permit and in the subsequent approval of other applications. He concluded that necessarily there will be damage by the drilling of an oil well, but no "unnecessary" damage; that drilling in a careful and prudent manner and in accordance with the rules and regulations cannot be "unnecessary" since it is required to accomplish the legitimate lease objective; and that Petitioner was only asking to drill as others had in the same area and the Fourteenth Amendment guaranteed equal treatment. (App. J, pp. A151-A153)

Objections to the hearing examiner's report were filed by respondents and the issues argued to the NRC. On April 16, 1974 Petitioner was notified that the NRC had adopted a motion to "set aside the Hearing Examiner's Report and uphold the denial, by the Supervisor of Wells, of a permit"; and had also asked the Attorney General's office to prepare such an order "with appropriate findings of fact." (App. H, p. A114) On May 14, 1974 Petitioner was advised that the NRC had accepted and approved the findings of fact and conclusions of law thus prepared by the Attorney General to support the resolution of denial already adopted without any such findings. (App. I, p. A115) In these findings (App. G, pp. A107-A113) the NRC rejected the findings of the hearing examiner and Petitioner's constitutional claims of due process, equal protection and impairment of contract which had been asserted in its appeal from the denial of the drilling permit.

The NRC's decision was appealed to the Ingham County Circuit Court which affirmed the Commission. (App. F, pp. A 91-A106) The Circuit Court likewise rejected Petitioner's constitutional arguments. Its decision was appealed to the Michigan Court of Appeals and was there affirmed in a 2 and 1 decision (App. E, pp. A55-A90) and that decision, in turn, was

affirmed by the Michigan Supreme Court in a closely divided decision. (App. A, pp. A1-A46)

Three of seven Justices dissented, holding that neither the Department of Conservation Act nor the Oil Conservation Act justified denial of the permit. Two of the dissenting Justices would have remanded the case to the NRC and one to the Circuit Court for a hearing under the state's Environmental Protection Act. (App. Q, pp. A227-A231) Petitioner applied to the Michigan Supreme Court for a rehearing, for reasons which included the court's tacitly condoning violations of Petitioner's constitutional rights of due process, equal protection and protection from impairment of contract and denial of right to introduce evidence on the ecological issues under the Michigan Environmental Protection Act. (App. C, pp. A49-A52) The Michigan Supreme Court denied the Motion for Rehearing without an opinion. (App. D, p. A53)

Justice Levin in his dissent (406 Mich. 56) pointed out the interrelation of this case and *West Michigan Environmental Action Council v. Natural Resources Commission*, 405 Mich. 741, 275 N. W. 2d 538 (1979), petition for writ of certiorari in *West Michigan* having been filed with this Court on August 29, 1979, October Term, 1979, No. 79-335:

"In both *West Michigan Environmental Action Council v. Natural Resources Commission*, 405 Mich.; NW 2d 1979), and the instant case, the oil companies (and in *West Michigan*, the DNR as well) took the position that the environmental issue was not properly raised and triable—in *West Michigan* because the complaint related only to the effects of the consent order and not to the effects of drilling test wells, in *Michigan Oil* because the issue framed was whether, as a result of the drilling, there would be "unnecessary damage" within the meaning of the oil conservation act.

"In both cases, the trier of fact agreed with the oil companies in the triable issue and concluded that any impact of the drilling on the ecology was not a valid reason for refusing to permit the drilling to proceed.

"While the environmental plaintiffs and intervenors presented evidence of environmental damage to the PRCFS [Pigeon River Country State Forest] as an entirety, the oil companies did not offer rebuttal either because they could produce none or because they relied on their legal position that the environmental harm shown by the environmental plaintiffs and intervenors was not a valid reason for refusing to allow the drilling.

"In both cases, on review—after the evidentiary record was closed—the trier of fact was reversed on the question of what was the triable issue: This Court holds, in *West Michigan*, that the effects of the test drilling was a triable issue in that case. The NRC ruled in the instant case that 'unnecessary damage' under the oil conservation act includes damage to the ecology; the circuit court and the Court of Appeals affirmed, and this Court affirms. As a consequence, the oil companies have not had an opportunity—after the rulings against them on what constituted the triable issue—to offer rebuttal evidence." (App. A, pp. A32-A33)

Immediately after the Michigan Supreme Court denied rehearing on May 7, 1979, by letter dated May 8, 1979 the DNR terminated Petitioner's lease, which Petitioner has protested without avail. (App. N, pp. A192-A193)

REASONS FOR GRANTING THE WRIT

The decision below raises important constitutional issues that merit review and resolution by this Court. A bare majority of the Michigan Supreme Court upheld a taking of the value of Petitioner's oil and gas lease without compensation in violation of its rights to due process and equal protection and its right against unlawful impairment of that contract. Its decision conflicts with the holdings of this Court and totally eradicates Petitioner's rights in its oil and gas lease without any compensation under the guise of protecting the ecology. This not only eliminates valuable oil potential for Petitioner but for the public, as well. As pointed out in the petition for writ of certiorari in

the inter-related case of *West Michigan Environmental Action Council, supra*, the disregard of due process has brought to a standstill a significant energy project in the Southern Pigeon River Forest area. It is critically important in this period of energy crisis, both for Michigan and the other states, that some fair balance be achieved in the maintenance and development of the total environment, rather than preserving the wild life habitat at the sacrifice of due process. Only this Court's review and reversal of the ruling below can restore some meaning to due process, equal protection and protection against impairment of contracts.

I. The State's Denial of a Drilling Permit and Termination of Petitioner's Oil and Gas Lease Is an Unconstitutional Taking of the Value of the Lease in Violation of Due Process and Equal Protection Under the Fourteenth Amendment and an Unlawful Impairment of Contract in Violation of Article I, Section 10 of the Constitution of the United States.

The State of Michigan initiated public sale to Petitioner's predecessor of the oil and gas lease here involved in 1968. It accepted bonus and yearly acreage payments, but thereafter denied a well permit to petitioner while approving permits to others nearby in similar locations. The State then litigated for over six years to impose a permit denial, totally frustrating the purpose of the lease and, immediately upon denial of rehearing by the Michigan Supreme Court, formally terminated the lease. During these years the state has received all of the benefit called for by the lease other than the drilling it curiously refuses, and Petitioner has been totally stripped of all rights.

The lease clearly provides in paragraph C of the official DNR form that it was:

" * * * for the sole and only purpose of drilling, boring, mining and operating for oil and gas and acquiring possession of and acquiring the same * * * ." (App. L, p. A175)

Paragraph G of the lease reserves to the state the right to use the premises "for any purpose other than, *but not to the detriment of*, the rights and privileges herein specifically granted." (Emphasis added) (App. L, p. A185)

Paragraph H of the lease provides:

"this lease shall be subject to the rules and regulations of the Department of Conservation now or hereafter in force relative to such leases, all of which rules and regulations are made a part and condition of this lease; *provided, that no rules or regulations made after the approval of this lease shall operate to affect the term of lease, rate of royalty, rental, or acreage, unless agreed to by both parties.*" (Emphasis added) (App. L, p. A186)

As the case now stands, the state has successfully prevented petitioner from accomplishing the purpose of the lease and, having achieved this, has specifically terminated the lease. It purports to have eliminated every right petitioner ever had in the lease and has done so totally apart from any eminent domain proceeding. If there ever was a total taking without compensation, this is such a case. The Circuit Court attempted to justify its position by stating:

"It might be noted parenthetically that petitioner still holds the oil lease rights and should there come a time that oil exploration technology makes it possible to drill State Corwith 1-22 without this degree of ecological destruction, petitioner may acquire a permit to so drill." (App. F, pp. A102-A103)

The majority of the Court of Appeals rationalized its position as follows:

"We turn next to the alleged constitutional infirmities in the commission's actions. Appellant claims that the denial of a permit to drill for oil constituted an unconstitutional taking of property without payment of just compensation. We disagree. As correctly pointed out by the circuit court judge in discussing this issue, there is no claim here and no proof that denial of this drilling permit would

result in the loss of the primary value of the property in question. It is clear, however, that should appellant never receive a drilling permit, whatever property interest appellant claims in the property in question would be valueless." (App. E, p. A67)

Time has now demonstrated that the state intended to and did make the denial of the drilling permit effective for all time. By its termination of the lease the state confirms what seemed clear to Petitioner all along: there had been a total taking without compensation.

A. Due Process

The instant case closely parallels *Pennsylvania Coal Company v. Mahon*, 260 U. S. 393 (1922). Under a deed to the surface homeowner the coal company had reserved the right to remove all of the coal and the surface owner specifically took the risk and waived all claims for damages that might arise from mining of the coal. A Pennsylvania statute was subsequently enacted which prohibited the mining of coal in such a way as to cause subsidence to houses. On suit by the private homeowner to prevent the mining of coal under his property, this court reversed the Pennsylvania Supreme Court and held that there was an unconstitutional taking and a violation of due process and contract rights. The Court said, at page 413:

"Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act * * *."

That limit was exceeded in the *Mahon* case and is here. In the instant case there is a total taking and a total elimination of the oil and gas lease. If that is not a taking without compensation, the constitutional protection has lost its meaning.

In *United States v. Causby*, 328 U. S. 256 (1946), this Court held that there was an unconstitutional taking of an easement of air space.

Respondents owned 2.8 acres near an airport which contained a house and out-buildings mainly used for raising chickens. The end of one runway of the airport was less than ½ mile from the buildings and the glide path of the runway passed directly over the property, which was 100 feet wide and 1200 feet long. The glide path was at an angle that placed it 67 feet above the house and 63 feet above the barn. The runway was being used about 4% of the time in takeoff and 7% of the time in landing. The United States began using the airport under lease commencing June 1, 1942, using four-motored heavy bombers and other military planes. The noise was startling and as a result of the noise, Respondents had to give up their chicken business, thus destroying the use of the property as a commercial chicken farm. Respondents also were deprived of their sleep and the family became nervous and frightened.

The government argued that any damages were merely consequential for which no compensation could be obtained under the Fifth Amendment.

This court held that there had been a taking of an easement over the property for which just compensation must be paid.

In petitioner's situation here there was a total taking. The use of the lease, limited to the sole purpose of drilling, was effectively prevented by the state and it made doubly sure of that effect by terminating the lease on May 8, 1979.

See also *Armstrong v. United States*, 364 U. S. 40 (1960) [Government's complete destruction of a materialman's lien in property held a "taking"]; *Hudson County Water Company v.*

McCarter, 209 U. S. 349 (1908) [if height restriction makes property wholly useless "the right of property prevails over the public interest"]; *United States v. Cress*, 243 U. S. 316 (1917) [repeated floodings of land caused by water project is a taking.]

As pointed out by the dissenting opinion of the Michigan Court of Appeals:

"In a case similar to the one at hand, *Union Oil Co. of Cal. v. Morton*, 512 F2d 743 (CA9, 1975), a federal lease for off-shore drilling with the right to erect a drilling platform had been sold to Union Oil Co. After one drilling platform caused a serious oil spill in the Santa Barbara Channel, an order of the Secretary of Interior suspended drilling rights in the area and denied Union the right to install another drilling platform. In remanding to the District Court, the Court made it clear that if the practical exercise of the lease was being denied indefinitely, such action of the Secretary must be overturned. After noting so that the Secretary had no powers of condemnation, the Court said, pp. 750-751,

'If, as Union contends, platform C is a necessary means for the extraction of oil from a portion of the leased area, refusal to permit installation of that platform now or at any time in the future deprives Union of all benefit from that lease in that particular area. We therefore conclude that an open-ended suspension of the right granted Union to install a drilling platform would be a pro tanto cancellation of its lease.

'Such taking by interference with private property rights is within the constitutional power of Congress, subject to payment of compensation. * * But Congress no more impliedly authorized the Secretary to take the leasehold by prohibiting its beneficial use than by condemnation proceeding. A suspension for which the fifth amendment would require compensation is therefore unauthorized and beyond the Secretary's power.' " (App. E, pp. A89-A90)

The latest due process case decided by this Court is *Penn Central Transportation Company v. City of New York*, 438

U. S. 104 (1978). It upholds the City in restricting air rights, but for reasons that are not applicable to the instant case. The Court held that there had been no interference with the present use of the property and that that use permitted a reasonable return on the investment. In addition, there had not been a total elimination of the air rights. While Penn Central had been refused permission to construct a 50-story tower above its terminal, construction of some smaller structure had not been precluded. Further, the air rights were transferable and readily marketable.

In the instant case there is no way to salvage the total destruction of all lease rights. The drilling which was the sole object of the lease was prohibited and the lease absolutely terminated. If there had been an extension of the lease to such a time in the future when a drilling permit was issued and opportunity given at that future time to drill, then there could have been some argument on a sufficient retention of rights that the state's action would not constitute a taking and preserved the constitutionality of the drilling prohibition. See for instance *Mobil Oil Corporation v. Kelley*, 353 F. Supp. 582 (SD Ala. 1973), where, much as in this case, the state announced its opposition to the company's drilling in Mobile Bay. The district court stated, at page 586:

"It is clear from the history of the Department of Conservation's issuance of permits under its oil and gas leases and from the content of the oil and gas leases in question, that it was contemplated by the parties at the time the subject leases were made that Mobil would have the right to drill. It would indeed be a strained construction of the lease arrangements to arrive at a conclusion which would in effect hold that the plaintiff received, and the defendant State Department of Conservation gave no more than a lottery ticket, a chance, for the right to drill for oil and gas."

The court then ordered that the primary term of the lease be extended until such date as the oil and gas board issued a valid

drilling permit and for an additional two years thereafter if there was drilling.

Here there is nothing to save the state action both prohibiting drilling and terminating the lease from condemnation as a constitutionally unwarranted taking in violation of due process.

B. Impairment of Contract

Not only does the state denial of Petitioner's drilling permit and the termination of its lease trample on its due process rights; such action also unconstitutionally impairs the obligation of the lease contract. *Allied Structural Steel Company v. Spannaus*, 438 U. S. 234 (1978), is the most recent case from this Court holding that the Contract Clause had been violated. The steel company was the sole contributor to a pension fund for its employees. It retained a virtually unrestricted right to amend and was free to terminate the plan and distribute the trust assets at any time for any reason.

In 1974, Minnesota enacted the Private Pension Benefits Protection Act under which an employer such as the steel company was subject to a "pension funding charge" if it either terminated the plan or closed a Minnesota office. The steel company closed its Minnesota office later that year and was then notified by the state that it owed a pension funding charge of approximately \$180,000. The company sued in federal district court asking for injunctive and declaratory relief. The Act was upheld and the appeal followed. The Court reviewed the background and more recent cases under the Contract Clause and held that it was violated.

The Court summarized the applicability of the Contract Clause at pages 243-245:

"The most recent Contract Clause case in this Court was *United States Trust Co. v. New Jersey*, 431 U. S. 1, 97 S. Ct. 1505, 52 L. Ed. 2d 92.¹⁴ In that case the Court again recognized that although the absolute language of the Clause must leave room for 'the "essential attributes

of sovereign power," *id.*, at 435, necessarily reserved by the States to safeguard the welfare of their citizens.' *id.*, at 21, 97 S. Ct., at 1517, that power has limits when its exercise effects substantial modifications of private contracts. Despite the customary deference courts give to state laws directed to social and economic problems, '[l]egislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption.' *Id.*, at 22, 97 S. Ct., at 1518. Evaluating with particular scrutiny a modification of a contract to which the State itself was a party, the Court in that case held that legislative alteration of the rights and remedies of Port Authority bondholders violated the Contract Clause because the legislation was neither necessary nor reasonable.¹⁵

III.

"In applying these principles to the present case, the first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.¹⁶ The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage.¹⁷ Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.

"The severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them." [Footnotes 14, 16 and 17 omitted]

¹⁵ The Court indicated that impairments of a State's own contracts would face more stringent examination under the Contract Clause than would laws regulating contractual relationships between private parties, 431 U.S. at 22-23, 97 S. Ct., at 1518, although it was careful to add that 'private contracts are not subject to unlimited modification under the police power.' *Id.*, at 22, 97 S. Ct., at 1518."

The Court then concluded, at pages 250-251:

"* * * But we do hold that if the Contract Clause means anything at all, it means that Minnesota could not constitutionally do what it tried to do to the company in this case."

We submit, likewise, that if the Contract Clause means anything at all, it means that the state cannot prohibit drilling and then cancel its lease as it has tried to do to Michigan Oil Company in the instant case.

While Petitioner's lease was subject to proper rules and regulations relating to the drilling, its sole purpose was drilling and, certainly, neither this nor the intention of the parties as shown by the lease as a whole contemplated a total frustration of purpose followed by the termination of the lease. Indeed, paragraph H specifically recognized that regulation was not to impinge on the lease term. Yet, that is precisely what the state has accomplished here by a blanket prohibition for all time on drilling, litigating that issue for over six years, and then terminating the lease.

C. Equal Protection

We have not found any equal protection cases paralleling the situation of Michigan Oil Company. However, the applicable equality principle seems clear.

In *Police Department of the City of Chicago v. Mosley*, 408 U. S. 92 (1972), a city ordinance forbade any picketing within 150 feet of a school, except for peaceful labor dispute picketing. The rationale for the rule was to prevent school disruptions. The Court found this ordinance to be invalid as an unequal application of a prohibition which had no relevance to the objective sought. The Court stated at page 95:

"* * * As in all equal protection cases, however, the crucial question is whether there is an appropriate govern-

mental interest suitably furthered by the differential treatment. See *Reed v. Reed*, 404 U. S. 71, 75-77, 92 S. Ct. 251, 253-254, 30 L. Ed. 2d 225 (1971); *Weber v. Aetna Casualty & Surety Co.*, 406 U. S. 164, 92 S. Ct. 1400, 31 L. Ed. 2d 768 (1972); *Dunn v. Blumstein*, 405 U. S. 330, 335, 92 S. Ct. 995, 999, 31 L. Ed. 2d 274 (1972)."

Reed v. Reed, 404 U. S. 71 (1971) explained the principles governing application of the Equal Protection Clause, at pages 75-76:

"In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. *Barber v. Connolly*, 113 U. S. 27, 5 S. Ct. 357, 28 L. Ed. 923 (1885); *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 71, 31 S. Ct. 337, 55 L. Ed. 369 (1911); *Railway Express Agency v. New York*, 336 U. S. 106, 69 S. Ct. 463, 93 L. Ed. 533 (1949); *McDonald v. Board of Election Commissioners*, 394 U. S. 802, 89 S. Ct. 1404, 22 L. Ed. 2d 739 (1969). The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co. v. Virginia*, 253 U. S. 412, 415, 40 St. Ct. 560, 561, 64 L. Ed. 989 (1920)."

In the instant case, the state granted drilling permits to others in close proximity to Petitioner's site, both before and after Petitioner's drilling permit was denied. The undisputed testimony was that Petitioner's well site was approximately 2½ miles north of State-Charlton 1-4 well, which was completed in June of 1970 as a commercial producer; that at the time of the evidentiary hearing there were five producing wells in Charlton Township, the township immediately south of Corwith Township

and also in the Pigeon River Forest; that since the denial of Petitioner's permit, three permits had been issued, one in Section 19 of Corwith Township and two in Charlton Township; that all of these wells, both producing and permitted, were comparably situated to Petitioner's with respect to the Black River and the Black River Swamp. The hearing examiner then specifically found as follows:

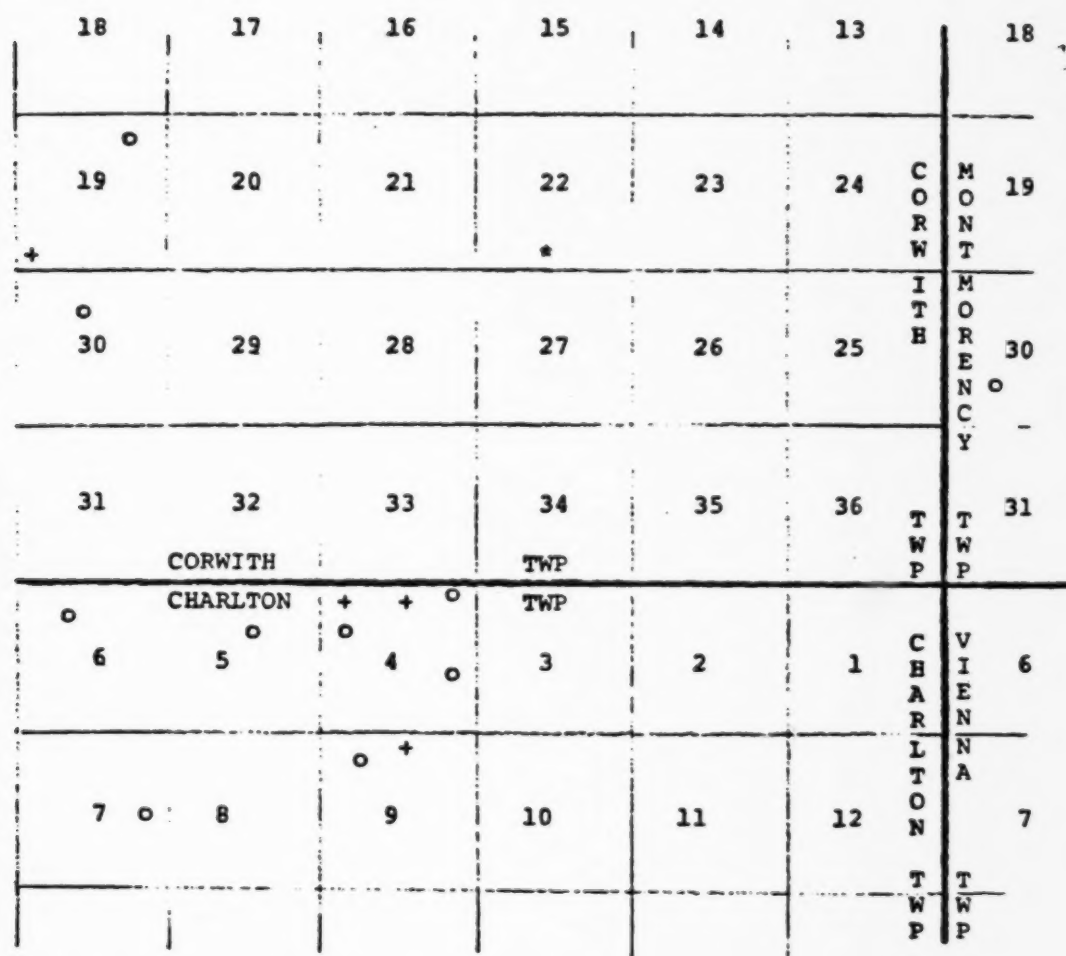
"5. The proposed well location does not differ in any significant way from other locations for which the DNR has granted drilling permits in the Pigeon River area."
(App. J, p. A153)

and recognized the constitutional problems which would arise if Petitioner was not permitted to so drill.

Further, the well permit information was updated to September 27, 1974 and this showed DNR approval and issuance of thirty-four drilling permits in a 2½ to 7-mile radius of Petitioner's site from the date of approval of the State-Charlton 1-4 well. Sixteen of these had been granted in the two-year period preceding Petitioner's application and eighteen in the eighteen months following denial of the application. (App. M, pp. A187-A189)

The Circuit Court based its rejection of the Equal Protection argument on the ground that the evidence of similar wells was not a sufficient showing of arbitrariness to constitute a denial of equal protection. The Circuit Court does not explain how it rationalized the finding of the hearing examiner nor does it make any reference to the updated well-permit information or the well permits approved after Petitioner's had been requested. While the Circuit Court justified its treatment on the basis of a change of policy by the DNR after the permit for the Charlton 1-4 well in 1970, this does not explain the unequal treatment of the approvals after Petitioner's request for a well permit on May 31, 1972.

N ↑



- * Petitioner's well location
- o Well permits issued subsequent to Petitioner's request
- + Well permits issued prior to Petitioner's request

[See App. M, pp. A187-A191]

Scale 1" = 1 mile

In its opinion affirming the Circuit Court, the majority of the Michigan Court of Appeals appeared to base its justification of the unequal treatment on the fact that "no permits have been issued on any of the land in the twenty-five square mile area surrounding proposed Corwith 1-22, indicating that denial of the instant permit was based on a plan having a rational foundation promoting a legitimate state purpose and, therefore, constituting no denial of equal protection to Appellant." (App. E, p. A73) A more detailed analysis of this seemingly large 25 square mile area dispels its applicability.

By reference to the attached diagram it may be seen that Petitioner's well site was on the southerly line of Section 22 of Corwith Township. Thus, of the twenty-five square miles referred to by the Court, fifteen were north of the drill site in three tiers of sections each one mile square. These were Sections 8 to 12 inclusive, 13 to 17 inclusive and 20 to 24 inclusive of Corwith Township. Ten of these one square mile sections were south of the well site in two tiers of five sections each, being Sections 25 to 29 inclusive and 32 to 36 inclusive. However, within a three mile radius of Petitioner's well site 13 permits had been issued, 9 of them subsequent to Petitioner's well permit request of May 31, 1972. One of these subsequent permits was just over two miles south of Petitioner's well site in Section 4 of Charlton Township; 2 others were in that same section; and one each in Sections 5, 6 and 9. Two others were just three miles west of Petitioner's well site, one in Section 19 and one in Section 30 of Corwith Township. Another was three miles east in Section 30 of Montmorency Township.

In view of the ecology claims used to justify the denial of Petitioner's well permit, including the claims that the elk are particularly sensitive to any human activity and have a range in the Pigeon River Forest of 600 square miles, that there is a county road only a few hundred feet from Petitioner's well site, running along the southerly line of Section 22, county roads on two sides of Section 22 and a trail road on the fourth side, as

well as interior trail roads, that there is a snowmobile parking lot about a half mile from the well site, a snowmobile trail only 330 feet away, and that camping, sightseeing, hunting, fishing, timber harvesting, horseback riding, hiking and motorcycle riding, all go on in the area, the attempted justification that such a program of well approvals represented a rational plan which did not deny equal protection is, itself, without foundation.

II. The NRC Ruling After the Evidentiary Hearing Had Occurred That "Unnecessary" Damage Under the Oil Conservation Act Included Damage to the Ecology Denied Petitioner Due Process by Precluding Any Opportunity to Offer Rebuttal Evidence.

This Court has repeatedly required, even in cases that involved informal administrative action, that notice be adequate "to apprise the affected individual of, and permit adequate preparation for, an impending 'hearing.'" *Memphis Light, Gas & Water Division v. Craft*, 436 U. S. 1, 14 (1978) [condemning as inadequate the notice provided by a regulated utility to one of its consumers on the grounds that it may not have apprised him of available procedures for challenging his disputed utility bill]. See also, *Matthews v. Eldridge*, 424 U. S. 319, 325n.4 (1976); *Goldberg v. Kelly*, 397 U. S. 254 (1970).

Petitioner had no such notice here. At the time of the evidentiary hearing, the sole issue in the case was whether as a result of the drilling, there would be "unnecessary" damage within the meaning of the Oil Conservation Act. Petitioner's evidence was designed to meet this claim and the hearing examiner, based on that statute* and Opinion 4718 of the Michigan Attorney General, held that "drilling and producing operations carried on in a careful and prudent manner and in keeping with applicable rules and regulations cannot be un-

* See page 9 *supra*.

necessary damages since these activities are required to accomplish the legitimate drilling and producing objective." Relying on this legal position which was the issue framed by the parties for the evidentiary hearing, Petitioner did not introduce any rebuttal evidence on the harm to the ecology (elk, bear and bobcat) claimed by the DNR and intervenor. Nor, since neither the ecology issues nor the Michigan Environmental Protection Act were a part of the case, was it proper to offer evidence pursuant to Sec. 3 of that Act that there were no reasonable alternatives to the proposed drilling or that drilling at Petitioner's site, in any event, served the larger public interest. It was only after the evidentiary hearing had closed and after the hearing examiner had made his findings of fact and conclusions of law, that the NRC reversed him on this question of what was the triable issue. The Michigan Supreme Court has affirmed the NRC's position. Moreover, this was done under a strained interpretation of the Oil Conservation Act and the Department of Conservation Act which ignored the failure to promulgate rules under the procedural safeguards of the Michigan Administrative Procedures Act (Mich. Comp. Laws § 24.201 *et seq.*), the provisions and purpose of the lease and the lack of any standard to determine whether such environmental damage is "unnecessary." At the same time, Petitioner has been deprived of an opportunity to present evidence on the subsequently determined ecology issue. As stated by Justice Levin in his dissent:

"While the environmental plaintiffs and intervenors presented evidence of environmental damage to the PRCSF [Pigeon River Country State Forest] as an entirety, the oil companies did not offer rebuttal either because they could produce none or because they relied on their legal position that the environmental harm shown by the environmental plaintiffs and intervenors was not a valid reason for refusing to allow the drilling.

"In both cases, on review—after the evidentiary record was closed—the trier of fact was reversed on the question of what was the triable issue: This Court holds, in *West*

Michigan, that the effects of the test drilling was a triable issue in that case. The NRC ruled in the instant case that 'unnecessary damage' under the oil conservation act includes damage to the ecology; the circuit court and the Court of Appeals affirmed, and this Court affirms. As a consequence, the oil companies have not had an opportunity—after the rulings against them on what constituted the triable issue—to offer rebuttal evidence." (App. A, pp. A32-A33)

In so entering judgment for the respondents under these circumstances, without at least remanding the case to the NRC to give Petitioner an opportunity to present its rebuttal evidence, the Michigan Supreme Court directly contradicted the rule of this Court in *Saunders v. Shaw*, 244 U. S. 317 (1917). In that case, Mr. Justice Holmes, writing for a unanimous Court, dealt with a situation remarkably similar to the present one. Plaintiff filed suit in a state court of Louisiana to enjoin the collection of a drainage tax, offering evidence to show that his land would receive no benefit from the drainage project. Defendant objected to this evidence, and it was excluded as inadmissible. 244 U. S. at 318. Ultimately, however, the Louisiana Supreme Court upheld plaintiff's claim that his land could not be benefited from the project and granted an injunction against the tax assessment.*

This Court reversed, holding that "when the trial court ruled that it was not open to plaintiff to show his land was not benefited, the defendant was not bound to go on and offer evidence that he contended was inadmissible, in order to rebut the testimony already ruled to be inadmissible * * *." 244 U. S. at 319. The Court took this action because it could not otherwise "be sure that the defendant's rights are protected without giving him a chance to put his evidence in." *Id.*

* Two Justices of the Louisiana Supreme Court, like the minority below here, dissented from its action, arguing that the case should be remanded to the trial court. 244 U. S. at 319.

Not only has the rule of *Saunders v. Shaw* been recognized in subsequent decisions of this Court,** but in other relevant contexts, this Court has struck down as inadequate, notice in state proceedings which was too vague to inform defendants or others of the precise nature of the charges or actions that might be taken against them. *Memphis Light, Gas & Water Division v. Craft*, *supra*, 436 U. S. 1; *Taylor v. Hayes*, 418 U. S. 488 (1974); *Eaton v. City of Tulsa*, 415 U. S. 697 (1974); *In re Ruffalo*, 390 U. S. 544, 551 (1968).

Here, Petitioner did not know until after the evidentiary hearing and indeed not until the Michigan Supreme Court's 4 justice majority opinion that "unnecessary" damage would be interpreted to include damage to the ecology. Accordingly, it had no opportunity to offer rebuttal testimony which was beyond the triable issue.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should be issued to review the decision of the Michigan Supreme Court.

Respectfully submitted,

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Dated: September 19, 1979

** See, e.g., *Hamling v. United States*, 418 U. S. 87, 110, 157 (1974), in which all nine members in the Court referred to the rule of that case without in any sense questioning its continuing application.

79-476

Supreme Court, U. S.
FILED

SEP 20 1979

MICHAEL WEAVER, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1979

No.

MICHIGAN OIL COMPANY, A MICHIGAN CORPORATION,
Petitioner,

vs.

NATURAL RESOURCES COMMISSION AND SUPERVISOR
OF WELLS AND PIGEON RIVER COUNTRY
ASSOCIATION,
Respondents.

**APPENDIX TO PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF MICHIGAN**

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APPENDIX A

STATE OF MICHIGAN
Supreme Court

MICHIGAN OIL COMPANY, a Michigan
Corporation,
Petitioner-Appellant,

vs.

NATURAL RESOURCES COMMISSION
and SUPERVISOR OF WELLS,
Defendants-Appellees,

and

PIGEON RIVER COUNTRY ASSOCIATION,
Intervenor-Appellee.

No. 59088

BEFORE THE ENTIRE BENCH

BLAIR MOODY, JR., J.

The issue before the Court is whether the Natural Resources Commission (NRC) properly denied Michigan Oil's permit application for oil and gas drilling on a 40-acre site of state-owned land known as Corwith 1-22 in July of 1972. Beyond this apparently simple question are broad policy considerations; therefore, it is necessary to fully understand the factual setting of the instant case before addressing the legal issues set forth.

BACKGROUND

Corwith 1-22, the 40-acre site involved in the instant controversy, is located in the Pigeon River Country State Forest (hereinafter the Pigeon River Forest or Forest) which consists of 92,872 acres of rolling hills, deep swamps, high forests, lakes and streams. Located in Otsego and Cheboygan Counties, the

Pigeon River Forest is one of the largest remaining tracts of publicly owned, wild, undeveloped land in the lower peninsula. Two of the state's highest quality trout streams, the Pigeon and Black Rivers, flow through the Forest. The Pigeon River Forest provides one of the few remaining favorable habitats in the lower peninsula for wildlife, including bear, bobcat, beaver, woodcock, osprey, eagle, and many other birds and animals.

The Forest is also the home of the largest remaining elk herd east of the Mississippi River. In fact, Section 22, containing Corwith 1-22, is in the heart of a 25-square-mile area of semi-wilderness which is the favored habitat of the elk harem.

Another natural resource, oil, one which provides great opportunity for profit, has also been found in the Forest. Thus, in 1968, when the Department of Natural Resources (DNR) sold oil and gas leases covering more than one-half million acres of state-owned land in the northern lower peninsula, it is not surprising that more than 10% or 57,669 of those acres were located in the Pigeon River Forest. As a consequence, more than one-half of this special Forest was leased for gas and oil development. Prior to the sale of the leases, no environmental assessment was made of the property to be leased. In fact, the regional office of the DNR was given only nine days to review the almost 600,000 acres prior to the proposed sale. The DNR received \$1,122,788 from the 1968 auction of oil and gas leases, or an average of \$2.06 an acre.

The first permit to drill on state-owned land in the Pigeon River Forest, pursuant to a 1968 lease, was issued in May of 1970. On September 16, 1970, after only two drilling permits had been issued, Governor William G. Milliken urged the NRC to establish a moratorium on the issuance of drilling permits for state land because of his "great concern about potential environmental intrusion and encroachment from oil and gas drilling in this important scenic forest area". During this moratorium the NRC instructed the DNR to launch field studies to pinpoint areas of special wildlife significance and unusual natural value, in an

effort to develop a comprehensive management plan for the Pigeon River Forest. Until a comprehensive plan could be developed, permit applications were reviewed on an individual basis to determine whether drilling would destroy natural resources. Subsequent to the moratorium, drilling permits were granted for state-owned land only in areas already damaged by oil development. During and subsequent to the moratorium, permits were issued for drilling on private land. Nevertheless, no drilling permit was issued within the 25-square-mile area surrounding Corwith 1-22, the proposed drilling site involved in the present controversy.

Corwith 1-22

State of Michigan Oil and Gas Lease No. 9656, covering 1,760 acres of Corwith Township including the 160 acres comprising the southeast $\frac{1}{4}$ of Section 22 was purchased by Pan American Petroleum Corporation. In December of 1968, Pan American assigned an undivided 50% interest in this lease to Northern Michigan Exploration Company and Amoco Production Company. In April of 1971, Northern Michigan Exploration and Amoco applied for a permit to drill a well on the southwest $\frac{1}{4}$ of the southeast $\frac{1}{4}$ of Section 22 of Corwith Township, a 40-acre site. On October 11, 1971, the Supervisor of Wells denied the application on the grounds that oil and gas drilling on the site would cause "serious and unnecessary damage" to various wildlife in the area, the swamp in the area would be affected, and the drilling would cause a "serious intrusion into a nearly solid block of semi-wilderness area of state lands". The denial specifically stated that *no* site in the 40 acres was acceptable. No appeal was made from this permit denial.

With full knowledge of this denial, because of his membership on the Oil and Gas Advisory Board of the Supervisor of Wells, Vance W. Orr, Vice President of McClure Oil Company and President of Michigan Oil Company, accepted on behalf of McClure Oil an assignment of the lease rights to this 40-acre site in Section 22 of Corwith Township. "For and in considera-

tion of the sum of One Dollar (\$1.00) * * * and other valuable considerations," Northern Michigan Exploration and Amoco assigned to McClure Oil Company their interest in Lease No. 9656 covering the 40-acre site in Section 22. Four months later, in May of 1972, McClure Oil entered into a contract with its wholly-owned subsidiary, Michigan Oil Company. Under the terms of the contract, Michigan Oil would receive assignment of the leasehold interest, if Michigan Oil could obtain a drilling permit and then drill a commercial producing well on the 40-acre site referred to as Corwith 1-22.

The Drilling Permit

Within two weeks of the contract agreement, Michigan Oil filed the second application for a permit to drill a well on Corwith 1-22. This second application was also denied by the Supervisor of Wells, in a letter dated July 21, 1972. In addition to noting the earlier denial of Northern Michigan Exploration and Amoco's application to drill on the same 40-acre site, the letter to Michigan Oil stated:

*"Oil and gas operations at the above site cannot be conducted without causing or threatening to cause serious damage to animal life and molesting or spoiling state-owned lands. * * **

"This area was originally leased on October 1, 1968. Due to our increased awareness of quality environment, and increased success in oil and gas exploration, I firmly believe this area would not have been offered for lease today.

* * *

"[T]he Natural Resources Commission has asked that we set up a forest management plan to preserve the special quality environment now present.

"Such a plan would establish a broad management policy for the area, identifying kinds of management programs and uses to be permitted. It would involve zoning of areas, each differing in intensity or type of use to be permitted. Preparation of this plan is under way at the present time

and should be completed within six months, including time for public hearings. For this reason it is appropriate that the present application be denied. You may also expect me to direct denial of all other applications for drilling permits in the area under study, pending drafting of and action on the management plan.

"With references to the present application I make the following specific points.

"The proposed drilling site is located in a 40-acre tract within a township about 93 percent state owned and hence almost entirely in a wild state. Similar conditions prevail in the townships to the north and south. This surrounding area is primitive in nature, largely wooded, with minimal development. The roads are narrow, winding, and highly scenic. *The proposed site is near the center of the Michigan elk range. The area has substantial populations of game—white-tailed deer, ruffed grouse, and woodcock, and relict populations of wildlife requiring extensive little-disturbed, wild areas such as black bears, bobcats, bald eagles, pileated woodpeckers, and ravens. All of the latter are scarce or very local in occurrence in the Lower Peninsula.*

"Development for oil or gas has not yet reached this secluded area." (Emphasis added.)

With nothing to lose and everything to gain, Michigan Oil, the potential assignee of McClure Oil's leasehold interest, appealed the denial of its permit application to the NRC. The NRC appointed a hearing examiner to conduct the administrative hearing. The Pigeon River Country Association intervened under the Michigan Environmental Protection Act (MEPA), MCL 691.1205(1); MSA 14.528(205)(1). The hearing examiner ruled, however, that the intervention was untimely and that the environmental protection act could not be raised. The examiner further ruled that the parties were limited to issues raised by the initial parties in their pretrial statements.

The hearing examiner filed a written report, adopting almost verbatim Michigan Oil's proposed findings of fact and conclusions of law, recommending that the drilling permit be issued.

The NRC, after reviewing the record, the briefs and the proposed findings of fact, rejected the recommendations of the hearing examiner and upheld the denial of Michigan Oil's application for a drilling permit. On May 9, 1974, the NRC issued its decision specifically finding the following:

"Damage to the ecosystem and *serious or unnecessary damage to animals would be caused* by opening entrance roads, truck traffic, succession of wells and general activities encountered in all oil-gas production. Particularly, serious effects would be caused to elk, bear and bobcat and could cause their virtual removal from a portion of the Pigeon River area. The tendency of the animals would be to avoid the area. Such effect would be particularly noticeable in the case of elk who are a wide ranging animal (Moran, T-2142; Harger, T-2243; Black, T-1331, 1332, 1333, 1352; Moore, T-1710; Johnson, T-1782, 1784-1786, 1819, 1924; Strong, T-1823, 1824).

"The Pigeon River area is the last stronghold of the bear and bobcat. Places where bear and bobcat can live are limited. Section 22 is good bear habitat (Johnson, T-1786, 1823; Harger, T-2246).

"Elk would be particularly affected by an oil operation because of their fragile nervous system and even clearing one acre will affect them. In turn, many small animals would be affected (Johnson, T-1823; Strong, T-1888, 1889; Moran, T-2152).

"The above testimony from game biologists as to the effect of the drilling of a well in this area comes from the DNR presentation and the opinions of their experts are unrebutted on the record. On considering the foregoing testimony the Commission must find that damage to or destruction of the surface, soils, animals, fish or aquatic life will occur." (Emphasis added.)

On appeal, the denial of the drilling permit for Corwith 1-22 was affirmed by the Ingham Circuit Court and by the Court of Appeals. *Michigan Oil Co. v. Natural Resources Comm.*, 71 Mich. App. 667; 249 N. W. 2d 135 (1976).

On April 20, 1977, this Court issued an order denying Michigan Oil leave to appeal. 399 Mich. 892 (1977). Subsequently, on July 14, 1977, Michigan Oil received a third appeal of the drilling permit denial when this Court, on reconsideration, granted leave to appeal. 400 Mich 843 (1977).

DISCUSSION

Thus, within this factual setting, the Court must determine whether the Natural Resources Commission had the statutory authority to deny Michigan Oil's application for a drilling permit on the 40-acre site known as Corwith 1-22 in the Pigeon River Forest. Specifically, we must decide whether the oil conservation act, 1939 PA 61, as amended, MCL 319.1 *et seq.*; MSA 13.139(1) *et seq.*, or the legislation which created the Department of Conservation, the DNR's predecessor, 1921 PA 17, as amended, MCL 299.1 *et seq.*; MSA 13.1 *et seq.*, provides sufficient statutory authority to justify the denial of a drilling permit in the instant case. Additionally, we are asked to determine whether the Michigan environmental protection act should be read *in pari materia* with the oil conservation act.

1939 PA 61

At the crux of this litigation is the question of the proper interpretation of the oil conservation act, 1939 PA 61, and the question of the nature of the authority granted to the Supervisor of Wells and the NRC to deny the issuance of a permit to drill on state-owned lands pursuant to oil and gas leases. Appellant, Michigan Oil, claims that 1939 PA 61 only empowers the Supervisor of Wells to withhold issuance of a drilling permit to prohibit waste which is unnecessary to the production of oil and gas. The statute, therefore, would impliedly protect any and all other waste, no matter how serious, if necessarily incidental to the production of oil and gas. According to the appellant, the clear import of 1939 PA 61 was not to conserve the environment

in general but to conserve only oil and gas so that they are efficiently extracted.

Neither the circuit court nor the Court of Appeals would accept this exceedingly narrow construction of the statute. We also reject a construction of the oil conservation act which would permit oil and gas drilling unnecessarily detrimental to the other natural resources of this state.

Under the statute before amendment in 1973, waste is defined "in addition to its ordinary meaning" to include "the unnecessary damage to or destruction of the surface, soils, animal, fish or aquatic life or property from or by oil and gas operations". MCL 319.2(1)(2)(2); MSA 13.139(2)(1)(2)(2). We are urged to find that the NRC exceeded its statutory authority because the letter denying Michigan Oil's application for a drilling permit referred to oil and gas operations at Corwith 1-22 causing "serious damage to animal life" rather than the statutory language of "unnecessary damage to or destruction of animal life".

We refuse to adopt this narrow, semantic analysis. Surely, if the Director of Natural Resources and the Supervisor of Wells in the denial letter dated July 21, 1972 had a crystal ball they would have used the statutory word "unnecessary" instead of "serious" to modify damage. The statutory words, "unnecessary damage" or "destruction", clearly apply to the correct findings of the Court of Appeals:

"The uncontradicted evidence below established that the proposed drill site is located in the midst of Michigan's elk range, that the elk herd which inhabits this area is the last sizeable wild elk herd east of the Mississippi River, and that oil and gas operations would cause the elk to avoid the area surrounding such operations, resulting in the reduction in the range and habitat of the elk and the decline in the population of the herd. Uncontradicted evidence established that oil and gas production activities would have the same effect on bear and bobcat, and that the area presently provides one of the few remaining favorable locations for

bear and bobcat in lower Michigan. These factual findings are amply supported by the record and indicate that the proposed drilling poses a serious threat to the survival of wildlife already found only in limited numbers in a limited area of the state." *Michigan Oil, supra*, 686-687.

Furthermore, we agree with the Court of Appeals interpretation concerning the ordinary meaning of waste:

"We are not prepared to hold that the 'ordinary meaning' of the term waste cannot include even the most serious permanent damage to or destruction of any and all natural resources of the state incidental to the production of oil." *Michigan Oil, supra*, 685-686.

The definitional section of the act relative to waste provided in part:

"(1) *As used in this act, the term 'waste' in addition to its ordinary meaning shall include:*

"(1) *'Underground waste' as those words are generally understood in the oil business, and in any event to embrace (1) the inefficient, excessive, or improper use or dissipation of the reservoir energy, including gas energy and water drive, of any pool, and the locating, spacing, drilling, equipping, operating, or producing of any well or wells in a manner to reduce or tend to reduce the total quantity of oil or casing-head gas ultimately recoverable from any pool, and (2) unreasonable damage to underground fresh or mineral waters, natural brines, or other mineral deposits from operations for the discovery, development, and production and handling of oil or casing-head gas.*

"(2) *'Surface waste,' as those words are generally understood in the oil business, and in any event to embrace (1) the unnecessary or excessive surface loss or destruction without beneficial use, however caused, of casing-head gas, oil, or other product thereof, but including the loss or destruction, without beneficial use, resulting from evaporation, seepage, leakage or fire, especially such loss or destruction incident to or resulting from the manner of spacing, equipping, operating, or producing well or wells, or incident to or resulting from inefficient storage or handling of oil, (2) the unnecessary damage to or destruc-*

tion of the surface, soils, animal, fish or aquatic life or property from or by oil and gas operations; and (3) the drilling of unnecessary wells." MCL 319.2; MSA 13.139(2). (Emphasis added.)

Appellant would have us read into the phrase "waste in * * * its ordinary meaning" the modifying language "as those words are generally understood in the oil business". Such interpretation clearly ignores the legislation's specific wording. When the Legislature defined "underground waste" and "surface waste" it specifically referred to the oil business. On the other hand, the Legislature omitted any reference to the oil business when including ordinary waste in the definitional section. Therefore, the ordinary use of the term "waste" does not refer only to waste of oil and gas, but includes any spoilation or destruction of the land, including flora and fauna, by one lawfully in possession, to the prejudice of the estate or interest of another. Serious damage to the wildlife of Corwith 1-22 resulting from oil drilling is spoilation or destruction that impairs state-owned lands and the people of Michigan's estate therein.

We would construe the oil conservation act liberally, to allow the NRC to prevent serious environmental damage, on the basis of additional statutory provisions. For example, although § 1, declaring the policy of the oil conservation act, addresses itself primarily to conservation of oil deposits, it clearly declares:

"Failure to adopt such a policy in the pioneer days of the state permitted the unwarranted slaughter and removal of magnificent timber abounding in the state, which resulted in an immeasurable loss and waste. * * * To that end this act is to be construed liberally in order that effect may be given to sound policies of conservation and the prevention of waste and exploitation." MCL 319.1; MSA 13.139(1).

It appears reasonable that a broad meaning can be ascribed to a definition of conservation as used in the declaration of policy section. Conservation should not be read to apply only

to the efficient extraction of oil, but should include the efficient extraction of oil which simultaneously conserves the other natural resources (flora and fauna) of the state. Support for this interpretation can be found in § 23 of the act which provided until its amendment by 1973 PA 61:

"[N]o permit shall be issued to any owner or his authorized representative who has not complied with or is in violation of this act, or *any of the rules, regulations, requirements or orders issued by the supervisor, or the department of conservation.*" MCL 319.23; MSA 13.139 (23). (Emphasis added.)

This specific reference to the DNR's predecessor in the oil conservation act demonstrates that the Legislature did not draft this act in a vacuum, intending to sacrifice all other natural resources in an effort to discover and produce oil and gas. To the contrary, this reference to the Department of Conservation implicitly mandates a statutory construction of the oil conservation act which allows the NRC to prevent serious environmental damage when reviewing drilling permit applications for state-owned land.

Despite this cross-referencing, appellant, Michigan Oil, contends that no rules and regulations existed in 1972 related to prevention of "unnecessary damage to or destruction of * * * wildlife". However, § 6 of the oil conservation act indicates that the Supervisor of Wells has the authority to deny a drilling permit to prevent waste without the aid of specific rules and regulations:¹

"The supervisor shall prevent the waste prohibited by this act. To that end, acting directly or through his authorized representatives, *the supervisor * * * is specifically empowered * * * to do whatever may be necessary* with respect to the subject matter stated herein *to carry out the purposes of this act, whether or not indicated, specified, or enumerated in this or any other section hereof.*" MCL 319.6; MSA 13.139(6). (Emphasis added.)

Accordingly, we find, as did the NRC, the circuit court and the Court of Appeals, that: (1) the oil conservation act placed an affirmative duty on the Supervisor of Wells to prevent waste, including serious or unnecessary damage to or destruction of wildlife, even in the absence of specifically promulgated rules and regulations; and (2) the proposed drilling at Corwith 1-22 poses a serious threat to the survival of wildlife already found only in limited numbers in a limited area of the state, and this serious threat falls within the statutory definitions of ordinary waste and surface waste which includes the unnecessary damage to or destruction of animal life. As indicated *infra*, any other finding would seriously undermine the affirmative statutory duty of the DNR and its predecessor of the Conservation Department to "protect and conserve the natural resources of the State of Michigan". MCL 299.3; MSA 13.3.

1921 PA 17

In denying Michigan Oil's application for a drilling permit, the Natural Resources Commission did not rely solely on the authority of the oil conservation act of 1939. The order of the NRC also refers to the conservation act of 1921, 1921 PA 17 as amended, MCL 299.1 *et seq.*; MSA 13.1 *et seq.* Through this act, the Legislature established the predecessors of the NRC and the DNR to "provide for the protection and conservation of the natural resources of the state". Preamble, 1921 PA 17, as amended by 1927 PA 337. The Commission (NRC) was specifically authorized to purchase land "on behalf of the people of the state" and the Department (DNR) was given the affirmative duty to "protect and conserve the natural resources of the state of Michigan". MCL 299.3; MSA 13.3. Pursuant to this authority, the Commission purchased approximately 65% of the now publicly-owned land in the Pigeon River Forest. The purchase and management of the Pigeon River Forest was funded by the fish and game protection fund pursuant to MCL 314.12; MSA 13.1361.

This background is necessary to understand why the NRC, in upholding the Supervisor of Wells denial of the permit, found that if the Department had not opposed the application for permit it would have failed in the performance of its duty to protect and conserve natural resources and game pursuant to 1921 PA 17. This conservation act empowers the Commission to enter into contracts for the taking of oil and gas and to make and enforce reasonable rules and regulations concerning the use and occupancy of lands and properties under its control. MCL 299.2; MSA 13.2. In this connection, § 23 of the oil conservation act, *supra*, becomes significant, by requiring that no permit be issued to any driller who has not complied with or is in violation of any "rules, regulations, requirements or orders" of the Supervisor or the Department of Conservation, the DNR.

The denial of a drilling permit by the NRC in the instant case was not based upon promulgated rules and regulations. The denial was based, however, upon specific guidelines formulated by the DNR and adopted by the Natural Resources Commission on June 11, 1971. These guidelines, entitled "Policy Governing the Review of Applications for Permits to Drill for Oil and Gas in State of Michigan", were issued in an intra-agency directive from the Director of Natural Resources to all supervisory personnel and specifically provided that:

"A drilling permit will be denied when the Supervisor of Wells finds that oil and gas operations cannot be conducted without causing or threatening to cause serious or unnecessary damage to or destruction of the surface, soils, animal, fish or aquatic life or property." (Emphasis added.)

Therefore, pursuant to its power under MCL 299.2; MSA 13.2, and based upon § 23 of the oil conservation act, which mandated that no permit be issued in violation of "requirements", *i.e.*, guidelines, of the DNR, the NRC refused to issue a drilling permit for Corwith 1-22 since such drilling would cause serious or unnecessary damage to or destruction of the elk, bear and bobcat populations.

Appellant Michigan Oil contends since MCL 299.3a; MSA 13.4, which grants to the NRC the power to promulgate appropriate rules and regulations, explicitly requires that such rules be promulgated in accordance with the Administrative Procedures Act, 1943 PA 88, as amended, the same requirement is applicable to § 2, MCL 299.2; MSA 13.2. This contention overlooks the basic differences between §§ 2 and 3a. Section 3a provides a criminal sanction in that:

"The commission of conservation *shall* make such rules for protection of the lands and property under its control against wrongful use or occupancy as will insure the carrying out of the intent of this act to protect the same from depredations and to preserve such lands and property from molestation, spoilation, destruction or any other improper use or occupancy. Nothing herein contained shall be deemed as allowing the commission of conservation to make any rule which applies to commercial fishing except as provided by law. Rules affecting the use and occupancy of such lands and property shall be promulgated in accordance with Act No. 88 of the Public Acts of 1943, as amended, being sections 24.71 to 24.80 of the Compiled Laws of 1948, and subject to Act No. 197 of the Public Acts of 1952, as amended, being sections 24.101 to 24.110 of the Compiled Laws of 1948. *A violation of any such rule is a misdemeanor.*" 1968 PA 199, MCL 299.3a; MSA 13.4. (Emphasis added.)

The criminal sanction of § 3a mandates promulgated rules and regulations. Furthermore, the first sentence of § 3a uses the word "shall", thereby requiring the NRC to promulgate rules and regulations.

Section 2, on the other hand, neither provided a criminal sanction nor ordered the NRC to act:

"The commission hereby created *may* adopt such rules and regulations, not inconsistent with law, governing its organization and procedure, and the administration of the provisions of this act, as may be deemed expedient. Said commission *may* also make and enforce reasonable rules

and regulations concerning the use and occupancy of lands and property under its control. 1963 PA 204, § 1, MCL 299.2; MSA 13.2. (Emphasis added.)

Furthermore, the 1975 and 1976 amendments to § 2, inapplicable in the instant case, did not alter the previously mentioned differentiations. Finally, a distinction as to scope should be noted. Section 2 creates licensing and leasing powers in the NRC and authorizes rulemaking within a policy-making format. Section 3a is concerned with wrongful use and occupancy of state-owned land and is designed to provide sanctions against poachers and trespassers.

Based upon this analysis, we can only conclude that the NRC acted within its authority under § 2, MCL 299.2; MSA 13.2, in denying the drilling permit based upon the specific guidelines formulated by the DNR and adopted by the NRC in 1971.

Notwithstanding the foregoing reasoning, a 1970-71 promulgated rule did provide the Supervisor of Wells with authority to deny the drilling permit in the instant case.²

MEPA

Having concluded that 1939 PA 61 and 1921 PA 17 provide statutory authority for denial of the drilling permit in the instant case, it is unnecessary to decide whether the Michigan environmental protection act, MCL 691.1201 *et seq.*; MSA 14.528 (201) *et seq.*, must be read *in pari materia* with the oil conservation act. Nevertheless, if an answer to this question were required, we would hold that the Michigan environmental protection act should be read *in pari materia* with all legislation relating to natural resources.

The rationale for such a holding can be found in *Detroit v Michigan Bell Telephone Co*, 374 Mich 543, 558; 132 NW2d 660 (1965); *app dis and cert den* 382 US 107; 86 S Ct 256; 15 L Ed 2d 191 (1965):

"Statutes *in pari materia* are those which relate to the same person or thing, or the same class of persons or

things, or which have a common purpose. It is the rule that in construction of a particular statute, or in the interpretation of its provisions, all statutes relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law, although enacted at different times, and containing no reference one to the other."

See also *State Highway Comm v Vanderkloot*, 392 Mich 159, 182; 220 NW2d 416 (1974). (Opinion by Williams, J.)

Since the MEPA specifically speaks to "any alleged pollution, impairment or destruction of the air, water or other natural resources", it is logical that the MEPA should be read *in pari materia* with other statutes relating to natural resources.

CONCLUSION

Having determined that in 1972 the Natural Resources Commission had statutory authority to properly deny Michigan Oil's request for a drilling permit in the Pigeon River Forest, we affirm the decisions of the circuit court and the Court of Appeals.

/s/ Blair Moody, Jr.

/s/ John W. Fitzgerald

// Illegible

1. Support for this position can be found in a 1970-71 rule promulgated under § 6 of the oil conservation act granting to the Supervisor of Wells authority to do whatever may be necessary, even when not specified in the act or specific rules and regulations. 1970-71 AACS R 299.2101 provides in relevant part:

"The supervisor, by virtue of section 6 of Act No. 61 of the Public Acts of 1939, as amended:

"(a) May enforce all rules and regulations, issue orders and instructions necessary to enforce such rules and regulations, and do whatever may be necessary with respect to the subject matter stated in the rules and regulations to carry out the purposes of the rules and regulations and of the act itself, whether or not such orders or instructions are indicated, specified or enumerated in the act or the rules and regulations."

Thus, this rule gave the Supervisor of Wells the power to deny the drilling permit based upon rationale appropriate under the act, without regard to enumerated rules and regulations. See also 1963 AACS R 299.2101.

2. See footnote 1, *supra*.

5 May 1978

STATE OF MICHIGAN Supreme Court

MICHIGAN OIL COMPANY, a Michigan corporation, <i>Petitioner-Appellant,</i>	}	No. 59088
v		
NATURAL RESOURCES COMMISSION and SUPERVISOR OF WELLS, <i>Defendants-Appellees,</i>		
and		
PIGEON RIVER COUNTRY ASSOCIATION, <i>Intervenor-Appellee,</i>		

BEFORE THE ENTIRE BENCH

LEVIN, J (dissenting).

The issue is whether the Natural Resources Commission, the governing body of the Department of Natural Resources, properly denied Michigan Oil, the holder of an oil and gas lease granted by the state, a permit to drill for oil and gas.

We would hold that

1) The present controversy is not moot. The DNR's management plan for the Pigeon River Country State Forest (PRCSF), developed by agreement with other lessees, to which Michigan Oil is not a party, after denial of Michigan Oil's application for a permit, does not resolve impropriety in the denial of its application in 1972. Since no oil or gas was produced by October 31, 1978, Michigan Oil's lease, in terms, expired on that date; the merits must be addressed to determine whether Michigan Oil, by reason

of the delays engendered by the DNR's denial of a permit, should be granted an extended lease term.

2) The Department of Conservation act¹ does not justify denial of a permit in the present case. While the act authorizes the adoption of rules and regulations concerning "use and occupancy of lands and property", no rule or regulation was adopted authorizing denial on the ground asserted by the DNR.

3) Nor does the oil conservation act² justify denial of a permit. Damage to or destruction of surface, soils, animal, fish or aquatic life from oil or gas operations is not waste within the meaning of the act if it is reasonably necessary to careful and prudent oil and gas operations.

4) The oil conservation act is not *in pari materia* with the environmental protection act. The environmental protection act fulfilled the Legislature's responsibilities under Const 1963, art 4, § 52. That act establishes independent substantive and procedural bases for the commencement of actions and for intervention in administrative proceedings. The act may be invoked only in accordance with its provisions.

We would reverse the Court of Appeals, extend Michigan Oil's lease for the time between the denial of its application for a drilling permit and October 31, 1978, and remand to the NRC for a hearing under the environmental protection act.³

I

The DNR offered at public auction in August, 1968, oil and gas leases to state-owned lands, including Corwith 1-22, the proposed drill site. Bids totalling \$1,122,788 were accepted for oil and gas leases covering 546,196.89 acres. The NRC and State Administrative Board approved the leases. In October, 1968, the state entered into an oil and gas lease with Pan-American Petroleum Corporation.⁴ So much of the lease as

covers Corwith 1-22 was by mesne assignments transferred to the McClure Oil Company which farmed the lease out to Michigan Oil, a wholly-owned subsidiary.

Michigan Oil's application for a permit to drill, filed May 31, 1972 pursuant to § 23 of the oil conservation act, was denied July 21, 1972. The denial was appealed to the NRC in accordance with § 3 of the act. The NRC assigned a hearing examiner.

Approximately one week before the hearing, the Pigeon River Country Association sought to intervene under the Department of Conservation act, the oil conservation act, and the environmental protection act.⁵ The issues to be heard had been earlier agreed to in meetings between the parties of record, Michigan Oil and an Assistant Attorney General representing the DNR. Intervention was allowed on the condition that intervenor could not raise issues not theretofore stated in the pretrial proceedings; the effect of the environmental protection act upon the application for a permit was not among those issues. The intervenor asserted at the hearing and on appeal that the environmental protection act is assimilated into the oil conservation act and the Department of Conservation act.⁶

The examiner filed his findings of fact and conclusions of law on October 11, 1973. He found that the drilling of the well at the proposed site would have "no significant effect as to the soil, surface, fish or aquatic life" and concluded that no waste or unnecessary damage would result from granting the permit. The examiner also found that "[i]t has been established by the testimony that Michigan Oil Company will drill the state-Corwith 1-22 in a careful and prudent manner under the supervision of the DNR and in compliance with all applicable rules and regulations." The examiner recommended that the permit be granted.

Objections to the examiner's report were filed by the Attorney General's office in behalf of the DNR and by counsel for intervenor. The matter was submitted to the NRC on the record before the examiner.

The NRC rejected the examiner's recommendation and denied Michigan Oil's application for a permit, and on May 9, 1974 adopted findings of fact and conclusions of law. The NRC stated that "[d]amage to the ecosystem and serious or unnecessary damage to animals would be caused by opening entrance roads, truck traffic, succession of wells and general activities encountered in all oil-gas production. Particularly serious effects would be caused to elk, bear, and bobcat and could cause their virtual removal from a portion of the Pigeon River area. * * *

[T]he commission must find that damage to or destruction of the surface, soils, animals, fish or aquatic life will occur." Stating that "[t]he department is required to protect and conserve natural resources and game pursuant to [the Department of Conservation Act]", the commission ordered that "[t]he action of the supervisor of wells in denying the drilling permit is upheld on the ground that to permit drilling will cause waste and constitute violation of [the Department of Conservation Act and the oil conservation act]." The commission did not disagree with the examiner's conclusion that Michigan Oil would drill in a careful and prudent manner.

Michigan Oil appealed the order denying a permit to the Ingham Circuit Court which affirmed. The Court of Appeals also affirmed the denial, one judge dissenting.

II

The DNR alleges that the controversy is moot and should be dismissed. It acknowledges that the primary reason Michigan Oil's application for a permit was denied was to allow the DNR sufficient time to develop a comprehensive scheme of management for oil drilling and exploration in the PRCSF. It now argues that because such a management plan was thereafter developed and agreed to by other lessees, this Court should direct Michigan Oil to reapply for a permit. It states that it will not now deny a permit on the grounds on which the 1972 denial was based.

The relief Michigan Oil has requested is an order directing the DNR to grant it a permit. The issue is whether the DNR had adequate grounds for denying a permit. If the grounds for denial were inadequate, Michigan Oil should be granted the permit sought in its 1972 application.

The consent order is, in terms, an agreement entered into by the DNR and other owners of oil leases in the area. Michigan Oil is not a party to that agreement, and it has no legal effect on the rights of Michigan Oil. Michigan Oil's right to drill for oil must be determined by the provisions of its lease and applicable law. It cannot be precluded from seeking to exercise its rights because the DNR subsequently agreed with other lessees to limitation of the provisions of their leases.

Michigan Oil's lease in terms expired on October 31, 1978 because no oil or gas was produced. We must therefore, in all events, turn to the merits of the controversy to determine whether Michigan Oil has been wrongfully denied a permit, and whether an extended lease term in which to apply for a permit should therefore be granted to it.

III

The NRC affirmed the denial of the drilling permit "on the ground that to permit drilling will cause waste and constitute violation of" the oil conservation act read in light of the NRC's responsibilities under the Department of Conservation act.

The disposition we think proper makes it unnecessary to consider whether the proofs support the conclusion that "the denial served to prevent the destruction or spoilation of state lands." In this connection we note that neither of the opinions for affirmance in this Court discusses the question of a standard for judging environmental claims under the oil conservation act and Department of Conservation act; nor do they relate the evidence to the stated conclusion that potential damage justifying denial of a permit was shown.

Section 2 of the Department of Conservation act provides that the NRC "may also make and enforce reasonable rules and regulations concerning the *use and occupancy of lands and property* under its control."⁷ Section 3a of the act provides that "[t]he commission of conservation shall make such *rules* for *protection of the lands* and property under its control against *wrongful use or occupancy* as will insure the carrying out of the intent of this act to protect the same from depredations and to preserve such lands and property from molestation, spoilation, destruction or any other improper use or occupancy * * * . * * * Rules affecting the *use and occupancy* of such lands and property *shall* be promulgated in accordance with" the Administrative Procedures Act.⁸ (Emphasis added.)

The Department of Conservation act thus grants the commission the power to promulgate appropriate rules and regulations in accordance with the Administrative Procedures Act.⁹ No such rule or regulation providing authority to deny a permit because of threatened "damage to the ecosystem and serious or unnecessary damage to animals" from drilling was adopted.

The NRC's "Policy Governing the Review of Applications for Permits to Drill for Oil and Gas in State of Michigan", relied on by the DNR, was not promulgated in accordance with the APA. The argument that rules and regulations adopted pursuant to § 2 of the oil conservation act need not be promulgated in accordance with the APA because the explicit requirements of § 3a do not apply to § 2 is insubstantial.

Section 3a was added to the act to spell out the manner in which the NRC may exercise its responsibility under the entire act. Its provisions are mandatory and apply to § 2: "The commission of conservation *shall* make such rules and regulations * * * [emphasis supplied]."¹⁰ Rules or regulations adopted by the NRC prohibiting "wrongful use or occupancy" must be formally adopted pursuant to the APA as provided in § 3a.

The policy relied on by the DNR states as its purpose the protection of "public and private lands and related natural

resources of the state from unnecessary damage, or destruction, and further to prevent unreasonable molestation, spoilation or destruction of state owned land under its jurisdiction and control," and thus relates to "use or occupancy" and is required under § 3a to be promulgated pursuant to the APA.

Moreover, whether § 3a modifies § 2 or not, the adoption of any rule or regulation under § 2 is, by virtue of provisions of the APA itself, subject to the APA. Whether termed a rule, regulation, requirement, guideline, or order, any "agency regulation, statement, standard, policy, ruling or instruction of general applicability, which implements or applies law enforced or administered by the agency,"¹¹ must be promulgated in accordance with the APA requirements of notice, hearing and publication.

No policy has the force of law unless it is promulgated pursuant to the APA as a rule. A rule becomes effective on the date fixed in the rule "which shall not be earlier than 15 days after the date of its promulgation."¹² Until the rule thus becomes effective it has no force or effect and the substantive law that the agency is charged with administering and enforcing remains unchanged. The policy relied on by the DNR to deny Michigan Oil's permit, to which it is otherwise entitled by the provisions of its lease and the statutes, was not enforceable because it was a rule within the meaning of and had not been promulgated in accordance with the APA.

We therefore conclude that whatever authority the NRC has under the Department of Conservation act to promulgate rules and regulations for the prevention of damage to animals and forest ecosystems from oil drilling has not been exercised in the manner required by the act, and therefore denial of the permit cannot be premised on the unpromulgated policy.¹³

IV.

Turning to the oil conservation act, the NRC concluded "on considering the foregoing testimony the commission must find

that damage to or destruction of the surface, soils, animals, fish or aquatic life will occur."

Assuming that the oil conservation act empowers the NRC to deny an application in contemplation of anticipated waste, including "unnecessary damage to or destruction of the surface, soils, animal, fish or aquatic life or property from or by oil and gas operations," we conclude that waste within the meaning of the act has not been established.¹⁴

Section 2(1) of the oil conservation act states that the term waste includes¹⁵ (i) the "ordinary meaning" of that term, (ii) "'surface waste', as those words are generally understood in the oil business," and (iii) surface waste in any event embraces "unnecessary damage to or destruction of the surface, soils, animal, fish or aquatic life or property from or by oil or gas operations." (Emphasis supplied.)

The ordinary meaning of the term waste means unauthorized damage to the estate or interest of another proprietor; no such damage has been shown. Surface waste as that term is generally understood in the oil and gas business means waste of oil or gas once or as it is brought to the surface; concern about such waste is not the impetus for this litigation. The principal issue is the meaning of "unnecessary damage" to animal life from oil or gas operations.

The purpose of the oil conservation act is conservation of oil and gas. Section 1 of the act declares that the failure of the state to adopt a conservation policy with respect to timbering allowed "the unwarranted slaughter and removal of magnificent timber abounding in the state, which resulted in an immeasurable loss and waste. In an effort to replace some of this loss, millions of dollars have been spent in reforestation, which could have been saved had the original timber been removed under proper conditions." Section 1 goes on to proclaim:

"The interests of the people demand that *exploitation and waste of oil and gas* be prevented so that the history of the loss of timber may not be repeated.

"It is accordingly the declared policy of the state to protect the interests of its citizens and land owners from *unwarranted waste of oil and gas* and foster the development of the industry along the most favorable conditions and *with a view to the ultimate recovery of the maximum production of these natural products*. To that end this act is to be construed liberally in order that effect may be given to sound policies of conservation and the prevention of waste and exploitation." (Emphasis supplied.)

The act is not designed to assure the balanced conservation of all natural resources but to assure conservation "with a view to the ultimate recovery of the maximum production" of oil and gas. The primary purpose of the act is *to prevent waste of oil and gas* so as to assure maximum production.

A.

The potential damage found by the NRC does not constitute waste within the "ordinary meaning" of that term. As the circuit court correctly noted, "[t]he Michigan Supreme Court in *In re Seager Estate* put it succinctly. Judge McGrath said 'it is not use, but abuse, that is waste,' 92 Mich 186, 196; 52 NW 299 (1892)." Waste is "a species of tort, which may be briefly and very generally defined as the destruction, misuse, alteration, or neglect of premises by one lawfully in possession thereof, to the prejudice of the estate or interest therein of another."¹⁶

The state as owner has granted the right to drill for oil to Michigan Oil. The incidental and unpreventable effects of prudent and careful drilling do not represent abuse or waste of the remainder of the state's proprietary interest.¹⁷ The state cannot complain of damage to its proprietary interest resulting from authorized and anticipated conduct.¹⁸ "Ordinarily, acts which would otherwise constitute waste may be authorized by the person whose estate or interest is affected thereby, so as to absolve the tenant from liability therefor."¹⁹ "It is of the nature of waste that it shall have been committed without legal right."²⁰

A lessee is authorized to use the leasehold in a manner reasonably necessary to accomplish the purpose of the lease

though damage may result. "[A]n oil and gas lease is said to carry within its implications, if not within its expression, such rights as to the surface as may be necessarily incident to performance of the objects of the contract, because a grant or reservation of minerals would be wholly worthless if the grantee or reserver could not enter upon the land in order to explore for and extract the minerals granted or reserved."²¹ "Thus, it is often stated that an oil and gas lessee is entitled to use the surface of the premises embraced by his oil and gas lease *without liability for surface damage* caused by his operations on the leasehold, so long as such use and the manner of its exercise are reasonably necessary to effectuate the purposes for which the lease was made."²² (Emphasis in original.)

The lease to Michigan Oil was for "the sole and only purpose of drilling, boring, mining and operating for oil and gas * * *."

Although use of the surface of the land by the lessee results in death and injury to wildlife belonging to the lessor, such use is not waste within the "ordinary meaning" of that term if it is reasonably necessary for oil and gas operations.²³ A lessee does not abuse or misuse the estate granted when it carefully and prudently exercises the rights specifically granted to it.

B.

Surface waste, "as those words are generally understood in the oil business", refers to waste of oil and gas that occurs once or as it is brought to the surface, and thus does not include "damage to or destruction of the surface, soils, animal, fish or aquatic life."

The potential damage found by the commission does not constitute "surface waste" as those words are "generally understood" in the oil business.²⁴

C.

Nor does the potential damage found by the NRC constitute "surface waste" because of "unnecessary damage to or destruc-

tion of the surface, soils, animal, fish or aquatic life or property from or by oil and gas operations."²⁵

An Attorney General Opinion, OAG, 1971-1972, No. 4718, p 17 (April 6, 1971), defined the provision:

"To the extent that oil and gas operations can be conducted from a given location without causing *unnecessary* damage to or destruction of the surface, soils, animal, fish or aquatic life or property, oil and gas operations cannot be proscribed therefrom, nor can the applicant be denied a permit to drill therefrom. * * *

"The damage or destruction resulting, caused or threatened by the operation at a given location must be 'unnecessary.' *The statute does not contemplate that no damage or destruction will result from operations. It prohibits damage arising from careless, imprudent operations—damages that may be prevented by appropriate measures.*" (Emphasis supplied.)

The hearing examiner similarly said:

"What is 'unnecessary' damage? Any activity, any user, of whatever kind or nature, requires some change in existing circumstances. Clearly, if a well is to be drilled and operated there must be some modification of the existing circumstances. The statute does not prohibit 'damage' but only 'unnecessary' damage. The drilling and operation of an oil well is a recognized, lawful activity. Implicit in this recognition is the fact that this activity will cause change. The well requires clearing of location, drilling machinery, installations and personnel. This is contemplated and understood for the statute permits 'necessary' damage, but bars only that damage which is 'unnecessary.' Drilling and producing operations carried on in a careful and prudent manner and in keeping with applicable rules and regulations cannot be 'unnecessary' damage since these activities are required to accomplish legitimate drilling and producing objectives."

The circuit judge said, however:

"It appears to this court that even inevitable damage done in the most careful and prudent manner may yet be

'unnecessary' in certain circumstances. Whether or not damage is necessary is not simply a question of whether or not the oil can be extracted without damage, carelessly or negligently caused, *it also concerns whether the oil itself is necessary, or whether the oil is so necessary that other values must be subrogated.*" (Emphasis added.)

The Court of Appeals agreed and said:

"We conclude that the construction given to the term waste by the Natural Resources Commission and the circuit court is the correct one and that the very acts of drilling for oil may constitute or result in waste prohibited by the oil conservation act."²⁶

This Court's opinion in *State Highway Commissioner v. Vanderkloot*, 392 Mich 159, 175; 220 NW2d 416 (1974), considered the construction of the term "necessity" in another statute. There the argument was that the required determination of "necessity" for the taking of land by the highway commission did not provide an adequate standard for judicial review of administrative action. The Court concluded that the term "necessity" suggested sufficiently precise standards of review because necessity is to be determined with respect to the purposes stated in the petition for taking:

"The inquiry more specifically reviews 'the necessity of the taking of all or any part of the property for the purposes stated in the petition.' MCL 213.368; MSA 8.261 (8). (Emphasis added.) Obviously the 'purpose stated in the petition' cannot be the taking of the particular property, because the Highway Department's purpose is not to take property but '[i]n general, it is the business of the commission to build and maintain highways.' *Central Advertising Co v State Highway Commission*, 383 Mich 1, 4; 172 NW2d 432 (1969). '[T]he purposes stated in the petition' therefore must be the highway purposes stated therein."

It would have been circular in *Vanderkloot* to construe "purposes stated in the petition" as the mere taking of property,

because this would have produced the result that the mere intent to take always supplied the purpose for and justified the taking. Similarly, § 2(1) of the oil conservation act is stripped of its meaning if the term "unnecessary" is to be defined solely by reference to mere damage to or destruction of the surface, soils, animal, fish or aquatic life or property from or by oil and gas operations. The mere fact of damage, no matter how extensive, cannot in and of itself suggest whether such damage is unnecessary or how lack of necessity is to be judged.

Substituting the term "serious damage" for "damage" does not resolve the question. It is again pertinent that neither opinion for affirmance addresses the question of a standard for determining whether damage is "unnecessary" nor, in concluding that the proofs adduced showed necessary damage, do they review the evidence and relate it to a standard.

The word "unnecessary" must be construed in conjunction with the stated purpose of the act to prevent "unwarranted waste of oil and gas" and to "foster the development of the industry along the most favorable conditions and with a view to the ultimate recovery of the maximum production of *these* natural products." (Emphasis supplied.) Whether damage is "unnecessary" is to be determined with respect to the legislatively mandated goal of maximum recovery of oil and gas through prevention of unnecessary waste of oil and gas.

The act indicates an intention to differentiate between unnecessary damage and mere damage, however severe the latter may be. Nowhere is this better illustrated than in § 6(c), by which the Supervisor of Wells is specifically empowered to "prevent pollution, damage to or destruction of fresh water supplies including inland lakes and streams and the Great Lakes and connecting waters, and valuable brines by oil, gas or other waters, to prevent the escape of oil, gas or water into workable coal or other mineral deposits." This language demonstrates an intention to allow the Supervisor of Wells to impose an absolute standard with respect to fresh water supplies in an effort

to prevent any and all damage. In contrast, the following clauses empower the Supervisor of Wells to "require the disposal of salt water and brines and oily wastes produced incidental to oil and gas operations, in such manner and by such methods and means that no *unnecessary damage* or danger to or destruction of surface or underground resources, to neighboring properties or rights, or to life, shall result." (Emphasis supplied.) By differentiating between the power of the Supervisor of Wells to determine and prevent damage with respect to fresh water supplies by applying an absolute standard and his more limited power to require no unnecessary damage to surface or underground resources resulting from the disposal of salt water, brines and oily waste, the Legislature indicated that mere damage is not to be treated the same as, or equated with, unnecessary damage.

We agree with the dissent in the Court of Appeals that "the question of whether oil and gas production is 'necessary' was affirmatively answered by the act itself, as, indeed, it was answered by the various acts of the Legislature authorizing the commission to select state lands for oil and gas leasing." We would hold that in deciding whether there will be unnecessary damage to or destruction of the surface, soils, animal, fish or aquatic life or property from or by oil and gas operations, it is not material whether the oil is itself necessary or not. Whether damage is unnecessary is to be determined in the context of the expressed purpose of the act to maximize the recovery of oil through prevention of its unwarranted waste.

The examiner found that Michigan Oil will conduct its drilling in a careful and prudent manner and that no damage will be inflicted upon the environment except for that necessarily caused by oil drilling. That finding has not been disputed by the NRC, the intervenor, the circuit court, or the Court of Appeals.

We conclude that the NRC erred in its construction of § 2(1) of the oil conservation act and, on the facts of this case, had no authority to deny a permit.

V.

The intervenor contends that even if the oil conservation act and the Department of Conservation act do not provide adequate statutory bases for denial of Michigan Oil's application for a permit, when those acts are read *in pari materia* with the environmental protection act the proposed drilling would constitute waste within the meaning of the *oil conservation act*.

The argument is premised on Const 1963, art 4, § 52,²⁷ requiring the Legislature to "provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction." It is then argued that in light of the Legislature's failure to incorporate environmentally protective provisions in all previously and thereafter enacted legislation, the environmental protection act must be deemed incorporated into all such legislation.²⁸

The environmental protection act, by its terms, is substantively supplementary to existing laws and administrative and regulatory procedures provided by law.²⁹ It provides an independent procedural route available in all cases.³⁰ The substantive and procedural deficiencies or limitations of other legislation notwithstanding, the environmental protection act is, in itself and without any need for reading it *in pari materia* with other statutes, adequately protective of the environment.

The act requires, however, that if a violation of its provisions is alleged the defendant be explicitly notified that its actions are being challenged under and pursuant to the provisions of that act. This accords with ordinary notions of orderly procedures.

The Court is not empowered to direct the attorney general or the NRC to raise issues under the environmental protection act. The act contemplates that a governmental agency may fail to raise environmental issues and therefore authorizes other persons to intervene in administrative proceedings or to commence

an independent action; those provisions protect against official indifference.

VI

The environmental issues were triable under the environmental protection act. The intervenor, albeit inartfully, sought to raise those issues in its petition to intervene. It did not, however, state environmental protection act issues in its pretrial statement, either because intervention had been allowed on condition that no new issue would be raised³¹ or because it thought such issues could be raised under the oil conservation act's rubric "unnecessary damage" or for other reasons.

A more appropriate disposition of this case would be to reverse the Court of Appeals and remand to the NRC for consideration of the environmental protection act claims under that act after all interested parties have had adequate time to compile and present evidence on such issues.

VII

In both *West Michigan Environmental Action Council v Natural Resources Commission*, 405 Mich; NW2d (1979), and the instant case, the oil companies (and in *West Michigan*, the DNR as well) took the position that the environmental issue was not properly raised and triable—in *West Michigan* because the complaint related only to the effects of the consent order and not to the effects of drilling test wells, in *Michigan Oil* because the issue framed was whether, as a result of the drilling, there would be "unnecessary damage" within the meaning of the oil conservation act.

In both cases, the trier of fact agreed with the oil companies on the triable issue and concluded that any impact of the drilling on the ecology was not a valid reason for refusing to permit the drilling to proceed.

While the environmental plaintiffs and intervenors presented evidence of environmental damage to the PRCSF as an en-

tirety, the oil companies did not offer rebuttal either because they could produce none or because they relied on their legal position that the environmental harm shown by the environmental plaintiffs and intervenors was not a valid reason for refusing to allow the drilling.

In both cases, on review—after the evidentiary record was closed—the trier of fact was reversed on the question of what was the triable issue. This Court holds, in *West Michigan*, that the effects of the test drilling was a triable issue in that case. The NRC ruled in the instant case that "unnecessary damage" under the oil conservation act includes damage to the ecology; the circuit court and the Court of Appeals affirmed, and this Court affirms. As a consequence, the oil companies have not had an opportunity—after the rulings against them on what constituted the triable issue—to offer rebuttal evidence.

The evidence of environmental damage is in both cases incomplete and imprecise, raising as many questions as it answers; it consists largely of opinion testimony, written reports and similar secondary evidence not confined to the effects of the specific drilling in issue. The hearing officer in the instant case posed a number of questions regarding the substantiality of the environmental claims which have not been met with evidence. His findings that no damage would result from drilling the one well Michigan Oil seeks to drill are well supported and not adequately met by the generalized findings of the NRC concerning the effect of "leapfrogging" hydrocarbon drilling on the PRCSF at large.³²

In both cases, leasehold rights granted by the state and large expenditures of time and money over an extended period of time by the oil companies in reliance on those rights are dismantled without an adequate opportunity, after the triable issue has been definitively stated, to test the real worth of the environmental claims.

The decision here brings to mind Mr. Justice Holmes' Observations in the *Northern Securities* case:

"Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend. What we have to do in this case is to find the meaning of some not very difficult words. We must try, I have tried, to do it with the same freedom of natural and spontaneous interpretation that one would be sure of if the same question arose upon an indictment for a similar act which excited no public attention, and was of importance only to a prisoner before the court. Furthermore, while at times judges need for their work the training of economists or statesmen, and must act in view of their foresight of consequences, yet when their task is to interpret and apply the words of a statute, their function is merely academic to begin with—to read English intelligently—and a consideration of consequences comes into play, if at all, only when the meaning of the words used is open to reasonable doubt."³³

This case, in which no opinion was signed by more than three justices,³⁴ makes neither good nor bad law; it is simply a result.

We would extend Michigan Oil's lease for the time that elapsed between the denial of its application and the expiration of its lease,³⁵ and remand to the NRC for a hearing under the environmental protection act.

/s/ Charles L. Levin,

/s/ Mary S. Coleman

1. 1921 PA 17, as amended; MCL 299.1 *et seq.*; MSA 13.1 *et seq.* Statutes quoted herein read as they did at the time applicable to this case, although some later revisions or amendments may have been made.

2. 1939 PA 61, as amended, MCL 319.1 *et seq.*; MSA 13.139 (1) *et seq.*

3. Michigan Oil further claims that if the statutes invoked by the DNR authorize it to deny a permit, they and the denial constitute an unconstitutional taking of the value of the lease. The issue has been extensively briefed and argued and was one of the questions on which leave to appeal was granted. Our disposition makes it unnecessary to decide the issue.

4. The granting clause of the lease declared:

"C. Said lessor for and in consideration of a cash bonus in hand paid * * * has granted, demised, leased and let, and by these presents does grant, demise, lease and let, without warranty, express or implied, unto the said lessee for the sole and only purpose of drilling, boring, mining and operating for oil and gas, and acquiring possession of and selling the same, and for laying pipelines and building tanks, power stations, and structures thereon, necessary to produce, save, and take care of such products, all those certain tracts of land * * *."

Paragraph G of the lease provided that the lessor reserves the right to use the premises leased, "but not to the detriment of the rights and privileges herein specifically granted." Paragraph H stated, "this lease shall be subject to the rules and regulations of the Department of Conservation now or hereafter enforced relative to such leases, all of which rules and regulations are made a part and condition of this lease; provided, that no rules or regulations made after the approval of this lease shall operate to affect the term of lease, rate of royalty, rental, or acreage, unless agreed to by both parties." The lease was for a term of 10 years "and as long thereafter as oil and/or gas are produced in paying quantities."

5. MCL 691.1201 *et seq.*; MSA 14.528(201) *et seq.*

6. See fn 1, *supra*.

7. MCL 299.2, MSA 13.2.

8. MCL 299.3a; MSA 13.4.

9. 1943 PA 88, as amended; superseded by MCL 24.201 *et seq.*; MSA 3.560 (101) *et seq.*

10. MCL 299.3a; MSA 13.4.

11. MCL 24.207; MSA 3.560(107).

12. MCL 24.247(1); MSA 3.560(147)(1).

13. Intervenor suggests that an opinion of the Attorney General, OAG, 1971-1972, No. 4718, p 17 (April 6, 1971), construes the Department of Conservation act as an independent basis for review

and denial of permit applications. While the opinion does indicate that the commission may proscribe oil and gas operations in specified areas under its control, it does not suggest that such proscription may be accomplished without the promulgation of appropriate rules and regulations.

14. The oil conservation act empowers the supervisor of wells

"(a) To make and enforce rules and regulations subject to the approval of the commission, issue orders and instructions necessary to enforce such rules and regulations and *to do whatever may be necessary with respect to the subject matter stated herein* to carry out the purposes of this act, whether or not indicated, specified, or enumerated in this or any other section hereof." MCL 319.6; MSA 13.139(6) (emphasis supplied).

It is unclear whether "subject matter stated herein" refers only to the other subsections of MCL 319.6; MSA 13.139(6), or whether it refers to the entire act.

Section 23 of the act provides:

"Upon receiving such written application and payment of the fee required, the supervisor shall within 5 days thereafter issue to any owner or his authorized representative, a permit to drill such well: Provided, however, That no permit to drill a well shall be issued to any owner or his authorized representative who does not comply with the rules, regulations and requirements or orders made and promulgated by the supervisor: And provided further, That no permit shall be issued to any owner or his authorized representative who has not complied with or is in violation of this act, or any of the rules, regulations, requirements or orders issued by the supervisor, or the department of conservation." MCL 319.23; MSA 13.139(23).

No suggestion has been made that Michigan Oil has not complied with any rule, regulation, requirement or order promulgated by the supervisor of wells or the NRC. Indeed, there is no indication that any rule or regulation extant in 1972 related to the prevention of surface waste as defined in § 2 of the act.

15. "[T]he term 'waste' in addition to its ordinary meaning shall include

"(1) 'Underground waste' as those words are generally understood in the oil business, and in any event to embrace (1) the inefficient, excessive, or improper use or dissipation of the reservoir energy, including gas energy and water drive, of any pool, and the locating, spacing, drilling, equipping, operating, or producing of any well or wells in a manner to reduce or tend to reduce the total quantity of oil or casing-head gas ultimately recoverable from any pool, and (2) unreasonable damage to underground fresh or mineral waters, natural brines, or other

mineral deposits from operations for the discovery, development and production and handling of oil or casing-head gas.

"(2) 'Surface waste', as those words are generally understood in the oil business, and in any event to embrace (1) the unnecessary or excessive surface loss or destruction without beneficial use, however caused, of casing-head gas, oil or other product thereof, but including the loss or destruction, without beneficial use, resulting from evaporation, seepage, leakage or fire, especially such loss or destruction incident to or resulting from the manner of spacing, equipping, operating, or producing well or wells, or incident to or resulting from inefficient storage or handling of oil, (2) the unnecessary damage to or destruction of the surface, soils, animal, fish or aquatic life or property from or by oil and gas operations; and (3) the drilling of unnecessary wells.

"(3) 'Market waste', which shall embrace the production of oil in any field or pool in excess of the market demand as defined herein." MCL 319.2(1); MSA 13.139(2)(1).

16. 78 Am Jur 2d, Waste, § 1, p 395. See, also, 93 CJS, Waste, § 1, p 559.

See *Jowdy v Guerin*, 10 Ariz App 205, 208; 457 P2d 745, 748 (1969); *Camden Trust Co v Handle*, 132 NJ Eq 97; 26 A2d 865 (1942); *Chapman Drug Co v. Chapman*, 207 Tenn 502; 341 SW2d 392 (1960); *Weaver v Royal Palms Associates, Inc.*, 426 SW2d 275 (Tex Civ App, 1968); *Sparks v Lead Belt Beer Co.*, 337 SW2d 44 (Mo. 1960); *Bresnahan v Hicks*, 260 Mich 32; 244 NW 218 (1932); *Gade v National Creamery Co.*, 324 Mass 515; 87 NE2d 180 (1949); *In re Stout's Estate*, 151 Or 411; 50 P2d 768 (1935).

17. See 1 Summers, Oil & Gas Law, §§ 32, 34.

18. The state as sovereign can ban or regulate many types of wasteful or harmful conduct under its police powers. These powers do not, however, expand the state's rights as proprietor when it claims that waste, as the term is ordinarily used, has been or is about to be committed.

19. 78 Am Jur 2d, Waste, § 8, p. 400.

See *Gulf Oil Corp v Horton*, 143 SW2d 132 (Tex Civ App, 1940); *Barrera v Barrera*, 294 SW2d 865 (Tex Civ App, 1956); *Turman v Safeway Stores*, 132 Mont 273; 317 P2d 302 (1957).

20. 93 CJS, Waste, § 2, p 561. See, also, fn 19 *supra*.

21. Anno: *What Constitutes Reasonably Necessary Use of the Surface of the Leasehold by a Mineral Owner, Lessee, or Driller Under an Oil and Gas Lease or Drilling Contract*, 53 ALR3d 16, 25-26, § 2.

See *Atlantic Refining Co v Bright & Schiff*, 321 SW2d 167 (Tex Civ App, 1959); *Miller v Ridgley*, 2 Ill 2d 223; 117 NE2d 759 (1954); *Davon Drilling Co v Ginder*, 467 P2d 470 (Okla, 1970); *Slade v Rudman Resources, Inc.*, 237 Ga 848; 230 SE2d 284 (1976).

22. Anno, fn 21 *supra*, § 2, p 31. See, also, cases cited *id.*, § 3, p 65.

23. See, e.g., *Marland Oil Co v. Hubbard*, 168 Okla 518; 34 P2d 278 (1934); *Texas Pacific Coal & Oil Co v Truesdell*, 187 SW2d 418 (Tex Civ App, 1945); *Warren Petroleum Corp v Martin*, 153 Tex 465; 271 SW2d 410 (1954); *Jones v Nafco Oil & Gas, Inc*, 371 SW2d 584 (Tex Civ App, 1963), *aff'd*, 380 SW2d 570 (Tex, 1964); *Young v McGill*, 473 SW2d 672 (Tex Civ App, 1971).

24. "Among the earlier legislative enactments designed to prevent the waste of oil and gas are the statutes in many of the states requiring operators to cap or shut in an oil or gas well within a stated or a reasonable time after drilling into the oil or gas producing stratum. Under this earlier type of statute the operator is usually permitted to leave a well open for a time within which to determine whether it is an oil producer, to allow the escape of gas while cleaning a gas well, while drilling to a deeper sand, or where the well is used for the production of oil. The more recent type of conservation statute prohibits waste of natural gas and oil and usually defines waste as including their escape into the open air in commercial quantities, and either by express statutes or by the regulations of the conservation agencies, wells are required to be shut in when an oil or gas stratum is penetrated, until the oil or gas can be produced without waste, and upper strata are required to be cased or sealed before deeper drilling is continued, and limitations are placed upon the escape of gas from an oil well.

"In some states the statutes give the conservation agency authority to make rules and regulations for the prevention of 'blowouts', 'caving' and 'seepage' as these terms are understood in the oil and gas business. A few states have statutes making it unlawful for an operator to negligently permit a well to go wild or get out of control.

"Several states have statutes prohibiting the waste of oil through inefficient storage and the waste of oil and gas through leakage in transportation or storage facilities.

"A very common cause of surface waste is the accidental or negligent burning of oil or gas escaping from wells, pipelines, or storage facilities. In several states there are statutes prohibiting the wasteful burning of gas wells. There are also various provisions of the statutes and regulations designed to remove fire hazards and prevent fires which may result in wasteful burning of oil or gas." 1 Summers, *supra*, § 77, pp 248-251 (emphasis supplied).

"The state has the power and duty to prevent the waste of oil and gas not only in place but above the ground, and both kinds of waste are usually denounced by the statutes. In determining the existence of waste above the ground, excess storage

of oil and gas and market demand are important factors." 58 CJS, Mines and Minerals, § 229, p 622.

25. MCL 319.2(1)(2)(2); MSA 13.139(2)(1)(2)(2) (emphasis supplied).

26. *Michigan Oil Co v Natural Resources Commission*, 71 Mich App 667, 686; 249 NW2d 135 (1976).

27. "The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment or destruction." Const, 1963, art 4, § 52.

28. Although the intervenor suggests that *State Highway Commissioner v Vanderkloot*, 392 Mich 159; 220 NW2d 416 (1974), held that to be the law of Michigan, these issues were not decided in that case. Three of the six members of the Court sitting in the case specifically declined to decide that issue.

29. MCL 691.1206; MSA 14.528(206).

30. MCL 691.1202; MSA 14.528(202).

31. The narrowing of the triable issues appears inconsistent with the interests protected by the environmental protection act. Commencement of an environmental action in circuit court or intervention in administrative proceedings after a project is well under way and, as here, legal proceedings are about to reach the hearing state is, understandably, a source of dismay to those who have been laboring to bring a project to fruition but, nevertheless, often occurs in environmental litigation.

Whether the delay of the intervenor in the instant case justified rejection altogether of the environmental claims has not been briefed. It appears that the asserted delay in commencing the action was "several months."

Allowance of intervention under the environmental protection act would have changed altogether the character of the proceedings. A new triable issue would have been injected, probably requiring an extended delay so that counsel for Michigan Oil could seek to determine with some precision the specific environmental claims being asserted and attempt to compile evidence rebutting them. The process would have been most time-consuming, not weeks but months. It is, therefore, doubtful whether the asserted delay in seeking to intervene prejudiced Michigan Oil or the other litigants.

32. The hearing examiner found:

WELL SITE AND SURROUNDING AREA:

* * *

County roads border Section 22 on three sides and a trail road is on the fourth. Tin Shanty Bridge Road, running north and south along the east section line [approximately 1300 feet east of the drilling site], is a primary county road. Maintained throughout the year this road connects to the south with Gibbs Valley Road, a black-top road running from Gaylord. At the northeast corner of the section, Tin Shanty Bridge Road meets Sturgeon Valley Road out of Vanderbilt. Sturgeon Valley Road, running along the north line of Section 22, is also a primary county road. On the south line is Old Round Lake Road running [approximately 300 feet south of the site] west from Tin Shanty Bridge Road to the Round Lake Campground. The roads on the north and south lines are maintained throughout the year except that they are not plowed during winter time. There are also several trail roads within Section 22, but these are not county roads and are not maintained.

The drill site is on high, sandy land sloping gently towards the Black River just over a mile to the south. Within two or three miles of the well site are the Pigeon River Research Station (Old Headquarters), Round Lake Campground, and the Pigeon River Bridge and Pigeon River Forest Campgrounds. The State-Charlton 1-4 discovery well is 2½ miles to the south in Charlton Township. Also, near at hand, about one-half mile south and just off Tin Shanty Bridge Road, is a snowmobile parking lot. Tyrolean Hills ski area is on the west side of Charlton, and Lakehead Pipeline running from western Canada to Port Huron traverses the west side of both Charlton and Corwith Townships, crossing the Black River. Michigan Consolidated Gas Company's pipeline running south from the Charlton 1-4 also crosses the Black River in the south part of Charlton Township.

The well site is stocked with aspen, birch and maple timber. The virgin pine was long ago removed, and Section 22 was entirely planted in the 1930's. This section has witnessed numerous, commercial timber harvests. Timber was harvested in 1946 on the 40 acres on which the well site is located and again in 1963. Altogether, from 1944 to 1968, there have been 16 timber harvests in Section 22. Immediately to the south in Section 27 there was clear-cut timber removal in 1967. In Section 23 to the east, timber harvest operations were carried on in 1970. Currently, there is a timber harvest under way in Section 21. Timber harvesting requires chain saw operations, loading vehicles, trucks and men.

The value of the timber at the well site, on the stump, is \$3.00 per cord. The timber will run 10 cords per acre.

The timber cover at the well site is common to northern Michigan. Some fifty-one (51%) percent of all forest lands in northern Michigan have this type of cover.

In the Pigeon River Area are found deer, bear, bobcat, elk and game birds. The Michigan elk range, which includes Corwith Township, covers approximately 600 square miles of territory, and is bounded on I-75 on the west, M-68 on the north, M-33 on the east, and M-32 on the south. The elk population is between 500 and 1,000 animals. Bear number from 30 to 50. The Pigeon River Area furnishes good habitat for wildlife. However, no unique or special wildlife habitat features are present at the well site, and the habitat is that generally found throughout the Pigeon River country.

The area is the scene of a great deal of activity. Among the activities carried on are:

1. Camping;
2. Snowmobiling;
3. Sight seeing;
4. Deer hunting;
5. Bear hunting;
6. Bobcat hunting;
7. Coyote hunting;
8. Rabbit hunting;
9. Bird hunting;
10. Commercial timber harvests;
11. Training of hunting dogs;
12. Fishing;
13. Mushroom picking;
14. Motorcycle riding;
15. All-terrain vehicle cruising;
16. Hiking;
17. Horseback riding;
18. Pigeon River Research Station;
19. Skiing;
20. Private clubs;
21. Pipelines;
22. Cabins;
23. Oil and gas wells;
24. DNR meetings and classes;

Snowmobilers use Old Round Lake Road, Tin Shanty Bridge Road, and Sturgeon Valley Road, all bordering Section 22, as well as the trail road on the west side of that section. Other roads throughout Corwith and Charlton Townships are used for snowmobile activity. There is a snowmobile parking lot in Section 27 off Tin Shanty Bridge Road and another parking lot in Section 21 near

Sturgeon Valley Road. At one time this past winter, twenty snowmobiles with forty persons were observed at the Round Lake Campground.

There are presently five producing oil and gas wells in Charlton Township.

EFFECT OF PROPOSED WELL:

If the State Corwith 1-22 is drilled, there will be no significant effect as to the soil, surface, fish or aquatic life or property.

This well will not affect in any significant way, deer, birds and small animals.

The claim is made, however, that the well would cause serious and unnecessary damage to elk, bear and bobcat. Nels I. Johnson, Regional Wildlife Biologist for Region II, testified as follows:

* * * If there were no elk up there, and if there were no bear or bobcats—just these other animals—from a wildlife point of view we could not claim serious and unnecessary damage.

With regard to elk, bear, and bobcat, there is testimony from several DNR witnesses that *any* human activity disturbs these animals, is detrimental to them, whether it be snowmobiling, camping, an oil well, or any other human presence or user. It is not an oil well in particular but human activity of any kind which disturbs them. It is the position of these witnesses that an oil well as a human activity will disturb the elk, bear and bobcat, and that any disturbance is serious and unnecessary damage because of their sensitive nature.

Although more than two years have now passed since the State-Charlton 1-4 discovery well, neither the DNR nor any DNR witness has yet made a study to determine the effect of an oil well on elk, bear and bobcat. Nor, for that matter, has one even been suggested. Likewise, no witness was able to point to a study on this subject made by anyone. The record is devoid of evidence as to the extent of disturbance by an oil well based on study or factual data.

At the same time, the testimony shows that elk are still in that area more than two years after the completion of the discovery well, sharing their range not only with oil and gas operations, but also with camping, snowmobiling, hunting, timber harvesting, and many other public and private uses.

* * *

Some DNR witnesses expressed fear as to offset wells which might follow. The testimony, however, was that Michigan Oil Company planned to drill only one well, and that one well could drain the prospective reservoir. Moreover, the control over the granting of additional permits, and the spacing and density of well locations, is vested by law in the DNR (§§ 6, 13 and 23 of Act 61 of Public Acts of 1939, above cited; Michigan Administrative Code, R299.1101). Additionally, each well is to be judged on its own merits under Commission policy and DNR procedures.

The well must be drilled in a careful and prudent manner by Michigan Oil Company. The location and access will be governed and controlled by the Forestry Division of the DNR. Drilling and producing will be at all times under the supervision and control of the DNR through its Geological Survey Division.

It must be concluded that this well, drilled and operated in a careful and prudent manner, will not cause any serious or unnecessary damage or destruction to the surface, soils, fish or aquatic life or property, nor will it unreasonably spoil or molest state land.

It has not been established that the State-Corwith 1-22 will cause damage to elk, bear or bobcat.

If human presence disturbs elk, such disturbance is already widespread in that area, and no one could testify that an oil well is more disturbing than snowmobiling, hunting, use of dog packs, commercial timber harvesting, and the many other activities now carried on throughout the year.

The NRC found:

It appears from the findings presented by the parties and from those submitted by the hearing officer that numerous issues and legal questions were raised during the 20 days of hearing, but none of the facts need to be reviewed in this opinion by the Commission or specific findings of fact and conclusions of law be made thereon except as may be set out in these findings.

The testimony shows that in the Pigeon River area are found deer, bear, bobcat, elk and game birds. The Michigan elk range, which includes Corwith Township, covers approximately 600 square miles of territory, and is bounded by I-75 on the west, M-68 on the north, M-33 on the east, and M-32 on the south. The elk population is between 500 and 1,000 animals. Bear numbers from 30 to 50. The Pigeon River area furnishes good habitat for wildlife.

Damage to the ecosystem and serious or unnecessary damage to animals would be caused by opening entrance roads, truck traffic, succession of wells and general activities encountered in all oil-gas production. Particularly, serious effects would be caused to elk, bear and bobcat and could cause their virtual removal from a portion of the Pigeon River area. The tendency of the animals would be to avoid the area. Such effect would be particularly noticeable in the case of elk who are a wide ranging animal.

The Pigeon River area is the last stronghold of the bear and bobcat. Places where bear and bobcat can live are limited. Section 22 is good bear habitat.

Elk would be particularly affected by an oil operation because of their fragile nervous system and even clearing one acre will affect them. In turn, many small animals would be affected.

The above testimony from game biologists as to the effect of the drilling of a well in this area comes from the DNR presentation and

the opinions of their experts are un rebutted on the record. On considering the foregoing testimony the Commission must find that damage to or destruction of the surface, soils, animals, fish or aquatic life will occur.

33. *Northern Securities Co v United States*, 193 US 197, 400-401; 24 S Ct 436; 48 L Ed 679 (1904).

34. *Negri v Slotkin*, 397 Mich 105, 109; 244 NW2d 98 (1976).

35. See *State ex rel Porterie v Grace*, 184 La 443; 166 So 133 (1936). The Court held that where drilling operations under mineral leases were interfered with by unsuccessful suit against the lessee, the lessee was entitled to an extension of the time allowed in its contract for the beginning of drilling operations for a period equal to the time during which litigation was pending.

STATE OF MICHIGAN

Supreme Court

MICHIGAN OIL COMPANY,
a Michigan corporation,
Petitioner-Appellant,

vs.

NATURAL RESOURCES COMMISSION
and SUPERVISOR OF WELLS,
Defendants-Appellees,

and

PIGEON RIVER COUNTRY
ASSOCIATION,
Intervenor-Appellee.

No. 59088

BEFORE THE ENTIRE BENCH

RYAN, J (To reverse)

I agree with Justice Levin's conclusion that neither 1921 PA 17, as amended,¹ nor 1939 PA 61, as amended,² constitute sufficient statutory authority for denial of the drilling permit in the instant case. Further, because of the unique situation facing the Court in deciding this case, I agree with Justice Levin that Michigan Oil's lease should be extended but I would remand this case to the circuit court for a hearing under the Michigan Environmental Protection Act, MCL 691.1201 *et seq.*; MSA 14.528(201) *et seq.*

In *West Michigan Environmental Action Council v Natural Resources Commission*, 405 Mich; NW2d (1979), this Court permanently enjoined the drilling of ten exploratory wells in the same area of the same Pigeon River Country State Forest in which the instant plaintiff is seeking permission to drill. The basis for decision in *West Michigan*

was the holding that the evidence adduced at trial in that case demonstrated that the drilling of wells in this area of the forest would likely result in an impairment or destruction of the Pigeon River Country State Forest elk in violation of the MEPA. Because of this decision in *West Michigan*, I feel the provisions of the MEPA cannot be ignored in deciding the instant case. I recognize that the MEPA was never litigated in this case, at least in part because the intervenor was precluded from raising any concerns under that act. It is beyond my powers of conjecture to determine the reason why the Department of Natural Resources, which is statutorily charged with the responsibility to protect and conserve the natural resources of this state, failed to raise the MEPA in the proceedings concerning the denial of this permit before both the special hearings officer and the Natural Resources Commission.

Nonetheless, the apparent failure of the department to adequately discharge its statutory responsibility to the people of our state should not have precluded consideration of the MEPA in the instant proceedings. I agree with Justice Levin in extending plaintiff's lease but would remand this case to the circuit court for proceedings under the MEPA. See particularly, MCL 691.1202; MSA 14.528 (202).

/s/ James L. Ryan

1. MCL 299.1 *et seq.*; MSA 13.1 *et seq.*
2. MCL 319.1 *et seq.*; MSA 13.139(1) *et seq.*

APPENDIX B

AT A SESSION OF THE SUPREME COURT OF THE
STATE OF MICHIGAN, Held at the Supreme Court Room,
in the City of Lansing, on the 1st day of March in the year of
our Lord one thousand nine hundred and seventy-nine.

STATE OF MICHIGAN
Supreme Court

MICHIGAN OIL COMPANY,
a Michigan corporation,
Petitioner-Appellant,

vs.

NATURAL RESOURCES COMMISSION
and SUPERVISOR OF WELLS,
Defendants-Appellees,

and

PIGEON RIVER COUNTRY
ASSOCIATION,
Intervenor-Appellee.

No. 59088

Present the Honorable

MARY S. COLEMAN,
Chief Justice,

THOMAS GILES KAVANAGH,
G. MENNEN WILLIAMS,
CHARLES L. LEVIN,
JOHN W. FITZGERALD,
JAMES L. RYAN,
BLAIR MOODY, JR.,

Associate Justices

CoA: 24747

LC: No. 74-16638 AA

This cause having been brought to this Court by appeal from the decision of the Court of Appeals and having been argued by counsel and due deliberation having been had thereon by the Court, IT IS HEREBY ORDERED that the judgment of the Court of Appeals is AFFIRMED.

State of Michigan—ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 7th day of May in the year of our Lord one thousand nine hundred and seventy-nine.

/s/ Corbin R. Davis
Deputy Clerk.

[SEAL]

APPENDIX C

STATE OF MICHIGAN
In The Supreme Court

MICHIGAN OIL COMPANY, a Michigan corporation, <i>Petitioner-Appellant,</i>	}	Supreme Court No. 59088
vs.		
NATURAL RESOURCES COMMISSION and SUPERVISOR OF WELLS, <i>Defendants-Appellees,</i>		
and		
PIGEON RIVER COUNTRY ASSOCIATION, <i>Intervenor-Appellee.</i>		

MOTION FOR REHEARING ON BEHALF OF APPELLANT MICHIGAN OIL COMPANY

Appellant Michigan Oil Company, by the undersigned, its attorneys, respectfully moves the court to grant a rehearing herein and vacate and set aside the decision filed on March 1, 1979, for each and all of the following reasons:

1. For all of the reasons urged in appellant's brief on appeal and oral argument herein.
2. Because the decision of the Court (with no opinion signed by a majority of the justices):

(a) Ignores the leasehold and property rights validly sold and conveyed by the State of Michigan, under the oil and gas lease here involved, to drill for and extract oil and gas from the instant site [including the implicit

determination by defendant DNR and the State Administration Board, in the issuance of this lease, that the potential oil and gas, and the State royalties and revenues therefrom, were in the public interest].

(b) Tacitly condones and upholds the taking of these valid leasehold rights without just compensation and due process of law, contrary to the provisions of Article I, § 17 of the Michigan Constitution and contrary to the United States Constitution, Amendment 14.

(c) Tacitly condones and upholds the denial of the equal protection of the law in that appellant was denied a permit to drill despite the issuance of numerous other drilling permits in the immediate surrounding area, contrary to the Michigan Constitution, Article I, § 2 and the United States Constitution, Amendment 14.

(d) Tacitly condones and upholds impairment of a valid state contract herein, contrary to the provisions of the Michigan Constitution, Article I, § 10 and the United States Constitution, Amendment 14.

(e) In effect holds that a lessor may unilaterally retake (or nullify) a valid lease by preventing use of the premises for the agreed purpose until eventual expiration of the leasehold term.

(f) Tacitly approves and condones such lessor breach by refusing to extend the lease term for a period equal to the lessor's refusal to permit lessee's use of the premises for the specified leasehold purpose.

(g) Disregards the fact that each of the Hearing Examiner's specific findings of fact herein was predicated upon the undisputed evidence in the record, whereas the DNR's rejection thereof was based upon generalizations and hypotheses not supported by any concrete evidence.

(h) Assumes and declares, without hearing or evidence thereon, that the theoretical interest or concern of some

undetermined segment of the citizens of this State as to a hypothetical adverse effect of this one use, at this small site near the intersection of 2 public roads, as compared with the many permitted area-wide activities and uses, upon a limited amount of elk and wild-life in the 600 square mile range, outweighs the interest of all of the citizens of Michigan in the potentially great amount of oil and gas at this site and the potential state royalties and revenues therefrom for the benefit of the state and its citizens as a whole.

(i) Declares that the Michigan Environment Protection Act [MCL 691.1201 *et seq.*; MSA 14.528(201) *et seq.*] is in *pari materia* with the Oil Conservation Act; yet denies this appellant any hearing thereunder, including appellant's right to show pursuant to Section 3 of MEPA, whether or not there is any "feasible and prudent alternative", and whether exploration for and production of oil and gas *at this specific site* "is consistent with the promotion of the public health, safety and welfare in light of the state's paramount concern" for the protection of its natural resources [which surely include production of oil and gas for public use and benefit if MEPA is in *pari materia* with Act 61, P. A. 1939.]

This motion is based upon the records, files and proceedings in this cause; and the brief heretofore filed by petitioner-appellant herein is hereby respectfully referred to, and in support hereof.

Dated: March 14, 1979.

HONIGMAN MILLER

SCHWARTZ AND COHN

By: John Sklar

/s/ JOHN SKLAR

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APPENDIX D

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 7th day of May in the year of our Lord one thousand nine hundred and seventy-nine.

Rehearing No. 488

MICHIGAN OIL COMPANY, a Michigan Corporation,
Petitioner-Appellant,

v.

NATURAL RESOURCES COMMISSION
and SUPERVISOR OF WELLS,
Defendants-Appellees,

and

PIGEON RIVER COUNTRY ASSOCIATION,
Intervenor-Appellee.

59088

Present the Honorable

MARY S. COLEMAN,

Chief Justice,

THOMAS GILES KAVANAGH,

G. MENNEN WILLIAMS,

CHARLES L. LEVIN,

JOHN W. FITZGERALD,

JAMES L. RYAN,

BLAIR MOODY, JR.,

Associate Justices

CoA: No. 24747

LC: No. 74-16638-AA

In this cause a motion for rehearing is considered and, on order of the Court, it is hereby DENIED.

State of Michigan—ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 7th day of May in the year of our Lord one thousand nine hundred and seventy-nine.

/s/ CORBIN R. DAVIS,
Deputy Clerk.

APPENDIX E

COURT OF APPEALS DECISION

MICHIGAN OIL COMPANY, a Michigan Corporation, <i>Petitioner-Appellant,</i>	}	No. 24747
v.		
NATURAL RESOURCES COMMISSION and SUPERVISOR OF WELLS, <i>Defendants-Appellees,</i>		
and		
PIGEON RIVER COUNTRY ASSOCIATION, <i>Intervenor-Appellee.</i>		

BEFORE: KELLY, P.J., and BRONSON and PETERSON, J.J.,
BRONSON, J.

The area around the Pigeon and Black Rivers in northeastern Otsego County, in the northern part of Michigan's lower peninsula, is rich in a variety of natural resources.

Forests, rivers, and lakes are found here, particularly in the Pigeon River State Forest and the nearby Hardwood, Black Lake and Thunder Bay State Forests. Since the area is largely state owned and largely undeveloped, it is relatively wild, unspoiled and secluded. Consequently, the area provides one of the few remaining favorable habitats for wildlife in Michigan's lower peninsula.

In this region is found Michigan's elk range, the home of the only sizeable wild elk herd east of the Mississippi River. The herd contains an estimated 500 to 1,000 elk, the descendents of a few hardy elk who were released in the area in 1918 in an

effort to reintroduce the animal to Michigan after they had been driven from this state in the late nineteenth century.

The area provides a home for many other forms of wildlife in addition to elk. Evidence suggests that this area is the sole remaining stronghold for black bear in the lower peninsula, and between 30 and 50 bear are estimated to inhabit this region. The region also provides one of the few remaining favorable locations for bobcats in this state. Other more common species of wildlife also inhabit this region, including deer and various game birds.

Another natural resource which has been found in the region is *oil*. Exploitation of oil as a natural resource provides greater opportunity for profit than elk, bear, or bobcats. Whether that profitability can be exploited by the extraction of the oil consistent with the conservation of the wildlife resources of the region is one issue which has been litigated in this case. Another issue concerns the scope of the authority of the Department of Natural Resources (DNR) to regulate the utilization and conservation of all of the state's natural resources. Overshadowing the other questions presented is whether and how a major policy blunder by a public agency, here the DNR, may be corrected.

The term "blunder" is not too strong a word to describe the DNR's 1968 decision to offer, at public auction, oil and gas leases covering some one-half million acres of state-owned land in the northern lower peninsula. The decision as to what lands to offer was made by the Natural Resources Commission with little investigation or consideration of the effects of possible drilling on state lands and other natural resources entrusted by law to the care of the commission.

The lack of scope and depth in the investigation is revealed by the testimony below which indicated that the various regional managers of the DNR were given nine days to make recommendations as to these some 500,000 acres. The only factor which was given consideration in arriving at the recommenda-

tions was whether any particular ongoing project, such as a state park, campground, or structural facility of some sort, was located on any particular parcel of land.

It appears from the record presented here that a major reason for leasing the land, and a likely reason for the limited consideration of the wisdom of that decision, was feeling within the department that no one would actually do any drilling. It was only later, after several wells had been drilled and oil found in several locations, when further drilling was being planned by the oil and gas lessees and after various individuals and groups of concerned citizens began to voice objections to the present and contemplated drilling, that the commission began to understand that there is really no such thing as a "free lunch".

Under attack here now by appellant Michigan Oil Company are the steps taken by the commission to limit the deleterious effects of its 1968 leasing decisions by giving consideration to plans for resource management to include the regulation of oil drilling on the state-leased lands.

We must now consider whether the steps taken were statutorily authorized and, if so, constitutionally permissible as those actions affect appellant. To examine these questions, some detail as to Michigan Oil's acquisition of its oil lease must be considered.

In the course of the oil and gas lease auction in August, 1968, bids totalling \$1,122,788 were accepted for oil and gas leases covering 546,196.89 acres of state lands. The sales were approved by the commission and by the State Administrative Board in September of that year. Among those granted leases was Pan American Petroleum Corporation, which obtained leases covering 116,845 acres for a bid of \$445,755. The leases obtained included State of Michigan Oil and Gas Lease No. 9656, which covered 1,760 acres of state land in Corwith County including 160 acres known as the southeast ¼ of section 22 of township 32 north, range 1 west. This land was

within the boundaries of the Pigeon River State Forest and contains the site of the drilling proposed by appellant, known as State-Corwith 1-22.

The lease was entered into pursuant to authority granted to the department by 1909 PA 280, as amended, and 1921 PA 17, as amended, and was stated to be for a period of 10 years, plus " * * * as long thereafter as oil and/or gas are produced in paying quantities from said lands by the Lessee". The granting clause of the lease provided as follows:

" 'C' Said Lessor for and in consideration of a cash bonus in hand paid, the receipt whereof is hereby confessed and acknowledged, and the signing and delivery of a bond, the amount and sufficiency of which is to be determined by the Lessor, and of the covenants and agreements hereinafter contained on the part of the Lessee to be paid, kept, and performed, has granted, demised, leased, and let, and by these presents does grant, demise, lease, and let, without warranty, express or implied, unto the said Lessee for the sole and only purpose of drilling, boring, mining and operating for oil and gas, and acquiring possession of and selling the same, and for laying pipelines and building tanks, power stations, and structures thereon, necessary to produce, save, and take care of such products, all those certain tracts of land situated in the County of Otsego, State of Michigan, and more particularly described as follows:

[description omitted]

it being the intention to convey to the Lessee the oil and gas rights to all of the lands described above subject to the control of the Department of Conservation as described herewith."

The Lease included the following significant limitations:

" 'H' This lease shall be subject to the rules and regulations of the Department of Conservation now or hereafter in force relative to such leases, all of which rules and regulations are made a part and condition of this lease; provided, that no rules or regulations made after the approval of this lease shall operate to affect the term of lease, rate of

royalty, rental, or acreage, unless agreed to by both parties."

Pan American Petroleum, by assignment dated December 14, 1968, assigned an undivided 50% of all of its rights in and to Oil and Gas Lease No. 9656 to Northern Michigan Exploration Company and Amoco Production Company. The assignment was approved by a deputy director of the Department of Conservation on March 18, 1969. Subsequently, on April 26, 1971, application was made by Northern Michigan Exploration Company and Amoco Production Company to the Supervisor of Wells, a state officer, for a permit to drill a well on the southwest ¼ of the southeast ¼ of section 22. The application was turned down on the grounds that oil and gas drilling on that site would cause "serious and unnecessary damage" in that injury would be caused to various wildlife in the area, the swamp in the area would be affected, and the drilling would cause a "serious intrusion into a nearly solid block of semi-wilderness area of state lands". The denial specifically stated that *no* site in the 40 acres was acceptable.

Michigan Exploration Company assigned their interest in this 40 acres to McClure Oil Company on January 28, 1972. After departmental approval of this assignment, obtained on April 3, 1972, McClure entered into a "farmout" agreement (as described in Judge Peterson's dissenting opinion) with its wholly own subsidiary, Michigan Oil Company, on May 19, 1972. Michigan Oil thereafter made application to the Supervisor of Wells on May 31, 1972 for a permit to drill a well on State-Corwith 1-22.

The application for a drilling permit was denied by the Supervisor of Wells by letter dated July 21, 1972. The letter, quoting from instructions by the Director of Natural Resources to the Supervisor of Wells, stated a number of reasons for the denial. It was said that oil and gas operations could not be conducted on the proposed site "without causing or threatening to cause serious damage to animal life and molesting or spoiling state-

owned lands". Reference was made to the earlier denial of the previous application to drill on the same 40-acre tract and it was stated that conditions had not changed since that time. It was further stated that a forest management plan was being prepared, and that it would be appropriate to deny the application and all other applications for drilling permits in the area under study pending completion of the plan.

Michigan Oil appealed the denial to the Natural Resources Commission pursuant to statutory provisions. After a hearing before an independent hearing examiner, the commission upheld the supervisor's denial of the drilling permit, stating in their order as follows:

"The action of the Supervisor of Wells in denying the drilling permit is upheld on the ground that to permit drilling will cause waste and constitute violation of [1921 PA 17, as amended], and [1909 PA 61, as amended]."

Among the commission's findings were that if a well were drilled in this area, "damage to or destruction of the surface, soils, animals, fish or aquatic life will occur". They concluded that if the well were permitted, waste, within the meaning of section 2 of 1909 PA 61, would occur.

Upon appeal to the circuit court, the commission's order upholding the Supervisor of Wells' denial of a drilling permit was upheld. Plaintiff now appeals the circuit court judgment as of right.

Appellant Michigan Oil asserts that by virtue of the rights which it has acquired in the oil and gas lease, the Supervisor of Wells and the Natural Resources Commission cannot deny to it a permit to drill for oil, or at least not for the reasons given to support the denial. Appellant asserts that no statutory authority exists to justify the denial and that, even assuming the existence of such statutory authority, the exercise of such authority, under the circumstances of this case, would be unconstitutional. It is also asserted that the record does not support

the findings of fact upon which the commission's conclusions of law are premised.

Before discussing the legal issues raised, we think it appropriate to discuss more generally the sources of the authority of the Supervisor of Wells and the Natural Resources Commission with respect to the land in question. Since the land is owned by the state in fee, and located in a state forest, the commission acts as proprietor of the land pursuant to 1921 PA 17, as amended, MCLA 229.1 *et seq.*; MSA 13.1 *et seq.* One specific section of that act empowers the commission to enter contracts for the taking of oil and gas and to:

[M]ake and enforce reasonable rules and regulations concerning the use and occupancy of lands and property under its control." MCLA 299.2; MSA 13.2.

Another section also invests the commission with rule making powers as follows:

"The commission of conservation shall make such rules for protection of the lands and property under its control against wrongful use or occupancy as will insure the carrying out of the intent of this act to protect the same from depredations and to preserve such lands and property from molestation, spoilation, destruction or any other improper use or occupancy." MCLA 299.3a; MSA 13.4.

It would seem plain that the authority thus granted the commission by statute to enter into contracts for the taking of minerals necessarily implies authority to decide *whether* to lease and on what terms any lease will be entered into. This power to lease state lands is clearly meant to be exercised in light of all of the duties imposed upon the Natural Resources Commission including, among others, duties imposed by MCLA 299.3; MSA 13.3, to "protect and conserve the natural resources of the state", to "provide and develop facilities for outdoor recreation", to "prevent the destruction of timber and other forest growth by fire or otherwise", and to "foster and encourage the protecting and propagation of game and fish". The commission

clearly could have refused to lease the lands in question in order to further any of these goals. The question presented now concerns the authority of the commission with regard to state lands for which oil and gas leases have been sold, and more particularly the commission's role in the statutory procedure for the issuance of permits to drill for oil.

Section 23 of the Oil Conservation act, 61 PA 1939, as amended, MCLA 319.1 *et seq.*; MSA 13.139(1) *et seq.*, prohibits the drilling of oil or gas wells absent the issuance of a permit by the Supervisor of Wells. Strictly speaking, the statute makes it the duty of the Supervisor of Wells to grant or deny applications for permits to drill. However, the Department of Natural Resources is also accorded a role in such decisions. The relevant section of the statute appears to require that a drilling permit be issued upon the filing of a proper written application, the filing of satisfactory surety bond, and payment of the required fee. The following proviso, however, indicates that the Department of Natural Resources is not without authority to take part in the permit issuing process:

"Provided, however, That no permit to drill a well shall be issued to any owner or his authorized representative who does not comply with the rules, regulations and requirements or orders made and promulgated by the supervisor; And provided further, That no permit shall be issued to any owner or his authorized representative who has not complied with or is in violation of this act, or any of the rules, regulations, requirements or orders issued by the supervisor, or the Department of Conservation." MCLA 319.23; MSA 13.139(23).

This proviso would seem to involve the DNR, as well as the Supervisor of Wells, in the procedure for the issuance of drilling permits to the extent of the rule making power of that agency. This section confers authority on the DNR to issue "rules, regulations, requirements, or orders" concerning gas and oil operations on land under its control. Where such rules and regulations concerning state lands would be violated by the drilling for oil,

the supervisor of Wells would be required by statute to deny any such application for a permit.

The scope of the commission's authority to regulate oil and gas operations on land under its control is in part defined by other sections of Oil Conservation Act. Section 4 of that act provides that:

Since the commission has the power to "make and enforce reasonable rules and regulations concerning the use and occupancy of land and property under its control", and may promulgate rules and regulations to protect such lands and property from "molestation, spoilation, destruction or *any other improper use or occupancy*", it would seem to follow that the commission may regulate oil and gas operations on state leased lands so as to prevent unlawful "waste". It follows that the commission may prohibit the drilling for oil on state lands under its control when such operations would cause or threaten to cause "waste" within the meaning of the Oil Conservation Act or "molestation, spoilation, or destruction" of state lands.

In short, the commission, acting on behalf of the people of this state, has the authority and the duty to regulate state lands under its control and their authority to so act does not end when application for a permit to drill for oil on state lands is filed.

The present appeal may be discussed within the framework of the statutory scheme. We agree with the observation in the dissenting opinion of Judge Peterson that the sequence of events which occurred here does indeed demonstrate an effort by the commission to redeem an apparent mistake. Quite clearly the commission has attempted to act so as to minimize possible deleterious effects of its ill-considered leasing decisions in 1968. But we see nothing wrong with a public agency, entrusted with preserving valuable resources belonging to the people of the State of Michigan, having once jeopardized those resources, taking all necessary and proper steps to rectify previous errors

so as to benefit the public. To the contrary, we are of the opinion that any public agency capable of recognizing that it has acted unwisely and which takes steps to rectify previous mistakes, should be encouraged so long as remedial efforts are lawful. Moreover, we think that the actions taken by the Supervisor of Wells and the Natural Resources Commission were within their statutory powers and not constitutionally prohibited.

Initially, we would disagree that the denial of the permit to drill was based solely on a claim of authority under the Oil Conservation Act to prevent waste. As noted, the July 21 letter from the Supervisor of Wells denying the permit relied not only on a claim of waste but also on the threat of "molesting or spoiling state owned lands" and additionally made reference to forest management plans then under consideration. While the language in the letter indicating that the proposed drilling would cause or threaten to cause serious damage to animal life implicitly relies on the section of the Oil Conservation Act prohibiting waste, the language concerning the possibility of a "molesting or spoiling [of] state owned lands" clearly indicates reliance on the previously quoted sections of 1921 PA 17, as amended, giving the Natural Resources Commission authority to protect state lands under its control, as does the reference to the contemplated rules for the management of state owned lands.

The opinion of the Natural Resources Commission, upholding the supervisor's denial of the permit, similarly does not rely solely on the commission's powers to prevent waste under the Oil Conservation Act. Rather, the opinion includes the following findings and conclusions clearly referring to the exercise of powers under 17 PA 1921, respecting state lands under the control of the commission:

"* * * The commission must find that damage to or destruction of the surface, soils, animals, fish or aquatic life will occur."

Again,

"The department is required to protect and conserve natural resources and game pursuant to Act 17, supra. If the department had not opposed the application for permit it would have failed in performance of this duty."

And, as has been noted, the commission's order specifically relies not only on the Oil Conservation Act but also in 1921 PA 17.

The conclusion which we draw from this sequence of events is that the commission exercised not only their powers under the Oil Conservation Act to regulate the drilling of oil and gas wells on state lands but also their more general powers as trustee of state land and resources including wildlife.

There is ample statutory justification for the reasons given for the denial of the permit. To the extent that the denial served to prevent the destruction or spoilation of state lands, it was justified by MCLA 299.3a; MSA 13.4, and to the extent that it was denied in the furtherance of the commission's powers to "make and enforce reasonable rules and regulations concerning the use and occupancy of lands and property under its control", it receives statutory justification under MCLA 299.2; MSA 13.2 and MCLA 299.3; MSA 13.3.

Moreover, we reject a construction of the Oil Conservation Act which would only empower the Supervisor of Wells and the DNR to prohibit waste which is unnecessary to the production of oil and gas and thereby impliedly protects any and all other waste, no matter how serious, if necessarily incidental to the production of oil and gas. The definition of waste found in Section 2 of the act is not so narrow. While the statutory definition does include "the unnecessary damage to or destruction of the surface, soils, animal, fish or aquatic life or property from or by oil and gas operations", the statutory definition includes as well the "ordinary meaning" of the term waste. We are not prepared to hold that the "ordinary meaning" of the term waste

cannot include even the most serious permanent damage to or destruction of any and all natural resources of the state incidental to the production of oil. Such a construction would be an unreasonable and unnecessarily narrow reading of the statutory language. We conclude that the construction given to the term waste by the Natural Resources Commission and the circuit court is the correct one and that the very acts of drilling for oil may constitute or result in waste prohibited by the Oil Conservation Act. The Natural Resources Commission therefore possessed statutory authority to order the denial of a drilling permit in order to prevent waste.

Appellant asserts that the factual findings of the commission are not supported by "competent, material and substantial evidence on the whole record". Const 1963, art 6, § 28 and § 106 of the Administrative Procedures Act of 1969, MCLA 24.306; MSA 3.560(206). Appellant would have us conclude that the evidence presented at the hearing below could not support a conclusion that oil drilling operations on the proposed site would result in serious harm to wildlife inhabiting the surrounding area. This position is untenable. The uncontradicted evidence below established that the proposed drill site is located in the midst of Michigan's elk range, that the elk herd which inhabits this area is the last sizeable wild elk herd east of the Mississippi River, and that oil and gas operations would cause the elk to avoid the area surrounding such operations, resulting in the reduction in the range and habitat of the elk and the decline in the population of the herd. Uncontradicted evidence established that oil and gas production activities would have the same effect on bear and bobcat, and that the area presently provides one of the few remaining favorable locations for bear and bobcat in lower Michigan. These factual findings are amply supported by the record and indicate that the proposed drilling poses a serious threat to the survival of wildlife already found only in limited numbers in a limited area of the state.

These findings are sufficient to support the commission's legal conclusion that drilling on the proposed site would result in "waste" within the meaning of the Oil Conservation Act and "damage to or destruction of" animals within the meaning of 17 PA 1921.

We turn next to the alleged constitutional infirmities in the commission's actions. Appellant claims that the denial of a permit to drill for oil constituted an unconstitutional taking of property without payment of just compensation. We disagree. As correctly pointed out by the circuit court judge in discussing this issue, there is no claim here and no proof that denial of this drilling permit would result in the loss of the primary value of the property in question. It is clear, however, that should appellant never receive a drilling permit, whatever property interest appellant claims in the property in question would be valueless.

It would appear to be clear and undisputed that the fact that appellant's property interest was in the first instance derived from a contract with the state does not and could not thereby exempt that property interest from the proper exercise of the state's police power. See *Robertson v Commissioner of State Land Office*, 44 Mich 274, 278 (1880); *Tucker v Gvoic*, 344 Mich 319 (1955); *Texas & New Orleans RR Co v Miller*, 221 US 408, 414; 31 S Ct 534; 55 L Ed 789 (1910); *American Land Co v City of Keene*, 41 F2d 484 (1930).

The Michigan Supreme Court, in *Robertson, supra*, p 278, had the following to say with respect to the state's power to regulate interests acquired pursuant to contracts between the state and a private citizen:

"The State as a sovereign cannot deal with it otherwise than as it might with a contract between two private citizens. But the State as a sovereign may subject the interest acquired by the contract to the taxing power and the police power, precisely as it might the interest acquired under any contract between two individuals, and not otherwise."

Also undisputed, and of significance in determining whether some property right obtained by appellant pursuant to the oil and gas lease in question has been "taken", is the fact that the lease was expressly made subject to "rules and regulations of the Department of Conservation now or hereafter in force". The sole restriction which the lease purported to make on the commission's control of the property was that rules and regulations made after the approval of the lease could not affect the "term or lease, rate of royalty, rental, or acreage", none of which restrictions are relevant to the instant case. It is thus inherent in the very nature of the property interest acquired by appellant by virtue of the 1968 Oil and Gas Lease that the property interest at all times was to remain subject to the Natural Resources Commission's authority to regulate state lands under its control.

Clearly the lease does not guarantee that the lessee will be permitted to drill for oil. The commission expressly retained its statutory authority to fulfill its duty to the people of the State of Michigan by regulating the use of the state lands and resources placed in its control and held by them as a public trust. Since the commission thus retained its authority to prevent the "molestation, spoliation [or] destruction" of the property in question, as well as to prevent "waste" in the production of oil and gas on that property, a proper exercise of that authority could not result in any diminishing of appellant's interest in the property obtained pursuant to the oil and gas lease. Since appellant's property interest is partially defined by the commission's statutory authority to regulate state lands, a proper exercise of that authority could not result in a taking in the constitutional sense.

Nor is this conclusion affected by the fact that the commission had not promulgated rules and regulations pursuant to the Administrative Procedures Act at the time of the denial of a drilling permit to appellant. The denials clearly indicated that a forest management plan was being prepared. Denial of oil drilling permits for areas which would be covered by such a

plan pending completion of the plan was a reasonable, if not essential, means of protecting the commission's rule making power. If drilling permits could not be denied pending promulgation of rules and regulations under consideration, permanent damage could occur in the interim rendering futile the commission's efforts to develop the promulgate official rules and regulations dealing with the area in question.

Appellant next asserts that the denial of the drilling permit pursuant to a resource management plan constituted a zoning plan and was illegal because the Natural Resources Commission possesses no statutory authority to engage in zoning. In conjunction with this argument, appellant also argues that to the extent that the commission has engaged in zoning and has denied their application for a drilling permit pursuant to a plan of zoning, that the denial is illegal because not subject to any standards.

The argument that the commission is without zoning power may be easily disposed of. This argument amounts to little more than a play on words. Every agency regulation concerning the use of land is not necessarily a "zoning" for which specific statutory authority to zone is required. The commission has the statutory authority, as discussed previously, to regulate the use of state lands, to prevent destruction of state lands and resources, and to control waste. They did not need statutory authority to "zone".

Nor do we agree with appellant that the decisions of the Supervisor of Wells and the commission were unlawful because not guided by statutory standards. The statutory standards which were relied upon, the threat of "waste" and "molestation, spoliation, or destruction" of state lands, provide an adequate statutory standard.

Substantive due process requires only that a standard utilized by an administrative agency in the performance of delegated legislative tasks be "as reasonably precise as the subject matter

requires or permits." *State Highway Commission v Vander Kloot*, 392 Mich 159, 173; NW2d (1974); *Osius v St Clair Shores*, 344 Mich 693, 698; 75 NW2d 25 (1956). In such a case, administrative officials are not left with the unbridled authority to act arbitrarily.

The Supreme Court recently held that the standard of "necessity" in the context of the highway condemnation act was a sufficient standard to meet due process requirements. *State Highway Commission v VanderKloot*, *supra*. We think that the Natural Resources Commission and the Supervisor of Wells here acted pursuant to standards at least as precise as the standard upheld in *VanderKloot*. Even more detailed standards may be expected to be defined upon promulgation by the commission of its contemplated plan for forest management. We hold that the actions were taken pursuant to a standard sufficient to meet due process requirements.

Appellant further asserts that the denial of a drilling permit constituted an unconstitutional impairment of a contract obligation by the state and is for that reason void. It is also argued that the state should be equitably estopped from depriving the appellant of its drilling rights by refusing the drilling permit.

Article 1, section 10 of the Michigan Constitution provides that: "No * * * law impairing the obligation of contract shall be enacted." The best that can be said for appellant's argument is that it confuses the constitutional prohibition against the state enacting laws impairing the obligations of contracts with the state allegedly breaching a contract to which it is a party. It has long been recognized that mere breach of contract by a governmental entity does not constitute an unconstitutional impairment of a contractual obligation. *Thompson v Auditor General*, 261 Mich 624, 634 (1933); *St Paul Gas & Light Co v St Paul*, 181 US 142; 21 S Ct 575; L Ed (1901); *Shawnee Sewerage & Drainage Co v Stearns*, 220 US 462; 31 S Ct 452; L Ed (1911).

Furthermore, as noted previously, this lease did not necessarily contemplate that the Supervisor of Wells and the Natural Resources Commission would be required, under any and all circumstances, to issue a drilling permit to the lessee. The commission, by entering into this lease, did not and could not deprive itself of its statutory duty to prevent waste or destruction of the state's resources under its control. (See cases cited, *supra*.) In fact, this lease was expressly made subject to rules and regulations of the commission "now or hereafter in force".

Michigan Oil Company's argument that the state should be equitably estopped from denying a permit to drill is without merit. Appellant's theory is that when the state, through one of its agencies, sold the lease in question to Pan American Oil Corporation, they impliedly promised that a permit to drill would be issued. The doctrine of equitable estoppel was defined by the Michigan Supreme Court in *Holt v Stofflet*, 338 Mich 115, 119; 61 NW2d 28 (1953), where it was said:

"It is a familiar rule of law that an estoppel arises when one by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts."

* * *

The circuit court held that, on the facts of this case, there was no holding out of erroneous facts to Michigan Oil nor justifiable reliance on their part. This holding was correct as the record supports the following finding of the circuit court judge which is unchallenged on this appeal:

"Indeed, Mr. Orr, president of Michigan Oil testified that he learned of the State-Corwith in question through his capacity as a member of the Oil and Gas Advisory Board of the Supervisor of Wells, and he further testified that he knew of the prior refusal of a permit when Michigan Oil purchased the lease and indeed it was purchased be-

cause a permit had previously been denied! In other words, Michigan Oil took a chance and lost." (Emphasis in the trial court opinion, transcript citations omitted.)

Appellant's final argument is that the instant denial of a drilling permit deprived appellant of its constitutional right to equal protection of the law in view of permits which had been and have been granted to others in areas from within two and one-half to seven and one-half miles from appellant's proposed well site. Appellant places particular reliance on the oil drilling permit granted for the well designated as the Charlton 1-4 discovery well, which is approximately two and one-half miles southwest of State-Corwith 122. Appellant has not, however, made out a case of arbitrary action denying it equal protection.

The Charlton 1-4 well was completed in June of 1970. It is clear that the standards for issuing drilling permits were substantially changed after the permit for this well was issued and there was testimony at the hearing below which indicated that under the standards in effect at the time of appellant's application, the Charlton 1-4 permit would also have been denied. Stricter standards for the prevention of waste and destruction of natural resources other than oil were implemented after the Charlton 1-4 well had been drilled and in fact largely because the drilling of that well had increased awareness within the department of the detrimental effects of a successful oil well on the Pigeon River State Forest.

The constitutional guarantee of equal protection of the laws certainly does not mean that a state agency, upon discovering that a former policy was in error, must nevertheless continue to pursue that dangerous policy to the point of destruction.

Moreover, as the threatened damage to animals in the Pigeon River area is in large part based on the fact that the animals will tend to avoid human activity, the commission, having once permitted a company to drill for oil in the Pigeon River area, was faced with choosing between a policy of permitting oil drilling on all state leased lands, leaving no undisturbed area

into which the animals could move, or drawing a line beyond which drilling would not be permitted. Thus, while drilling permits have been granted in the immediate area surrounding Corwith 1-4 and in the immediate areas of other wells already drilled, drilling in those areas would not cause additional encroachments into previously undisturbed areas or necessarily cause any further disruption of wildlife living habits in those areas. On the other hand, no permits have been issued for any of the land in the 25-square-mile area surrounding proposed Corwith 1-22, indicating that denial of the instant permit was based on a plan having a rational foundation promoting a legitimate state purpose and therefore constituting no denial of equal protection to appellant.

We conclude that the circuit court judgment should be affirmed. The denial of a drilling permit to appellant Michigan Oil Company was contemplated by their lease. It constituted a statutorily permissible exercise of the authority of the Natural Resources Commission. It deprived appellant of no constitutional right.

We caution the Natural Resources Commission that appellant cannot be indefinitely denied a drilling permit on the basis of contemplated rules and regulations. We expect that a comprehensive management plan be completed and officially promulgated in the near future. While we approve of administrative agencies demonstrating a degree of flexibility in perceiving and reacting to new problems or dealing with past mistakes, the procedural safeguards contained in the Administrative Procedures Act of 1969, MCLA 24.201, *et seq.*; MSA 3.560(101) *et seq.*, must also be recognized as the public's first defense against arbitrary agency action. Should Michigan Oil Company apply once more for a drilling permit, the Natural Resources Commission will have to show some substantial progress towards official promulgation of the rules and regulations which they have been considering in order to justify further denials. On the present record, however, we see sufficient evidence that the

commission has undertaken to shoulder previously neglected responsibilities to justify the disputed denial.

Affirmed. No costs, this being a public question.

Peterson J., Dissenting

This is an appeal from a judgment of the Circuit Court of Ingham County upholding the denial by the Michigan Department of Natural Resources (DNR) of a permit to drill for oil and gas on property which had been leased by the DNR for the express purpose of drilling for gas and oil. An apparent denial was initially made by the supervisor of wells, the issuing officer, and denial was upheld on appeal by the Natural Resources Commission. The denial is founded solely upon a claim of a police power under the Oil Conservation Act¹ to prevent "waste", here found by the Commission to consist of threatened "damage to the ecosystem and serious or unnecessary damage to animals."²

We are presented with the question of whether such damage constitutes "waste" under the Oil Conservation Act and, if so, whether that justifies denial of the drilling permit. We are not concerned with the Environmental Protection Act; the appellant's environmental impact statement complied with the

1. 61 PA 1939, as amended; MCLA 319.1 et seq.; MSA 13.139(1) et seq. References to the act hereafter will be by section number only identifiable in MCLA by the number after the decimal and in MSA by the number in parentheses. Thus § 23 of the act is cited as MCLA 319.23 and MSA 13.129(23).

2. While my brothers find the action of the Commission to be properly founded in the duty imposed upon the Commission by 1921 PA 17, MCLA 229.1, MSA 13.1 to manage public lands under its control, the Commission itself made factual findings only of "damage to or destruction of the surface, soils, animals, fish or aquatic life," language contained in the Oil Conservation Act's definition of waste. And see the Commission policy statement of June 11, 1971, fn. 8, post. While my brothers cite § 2 of 1921 PA 17 empowering the Commission to adopt rules and regulations to implement the act, neither they nor the Commission have asserted any such rule or regulation as the authority for the Commission's action herein. Since there is none such, the omission is eminently reasonable.

Act and was approved by the DNR staff. Neither are we concerned with the qualifications of appellant; no claim was made that appellant was other than a careful, prudent operator of long experience in the business, or that appellant was or had been in violation of the Oil Conservation Act or the rules and regulations promulgated thereunder.³

The sequence of events demonstrates an effort to redeem an apparent public agency mistake without confession of error, at private expense, and of course, in the name of the public good.

By lease dated October 1, 1968, the DNR conveyed the oil and gas rights to certain lands in the Pigeon River State Forest. As to one such lease, appellant is the successor for forty acres in section twenty-two of Corwith Township in Otsego County, referred to as State-Corwith 1-22.⁴ Prior to the 1968 sale of

3. The rules and regulations promulgated under the Act as part of the State Administrative Code are set forth at R 299.1101, et seq. There are none dealing with waste in the environmental or ecological sense, or restricting the issuance of drilling permits in relation to environmental or ecological factors.

4. The lease provides:

"C. Said Lessor . . . has granted, demised, leased and let, and by these presents does grant, demise, lease and let, without warranty, express or implied, unto the said Lessee for the sole and only purpose of drilling, boring, mining and operating for oil and gas . . . and for laying pipelines and building tanks, power stations, and structures thereon, necessary to produce, save, and take care of such products, all those certain tracts of land, . . . (descriptions omitted) . . . it being the intention to convey to the Lessee the oil and gas rights to all of the lands described above subject to the control of the . . . (Lessor) as described herewith.****

G. The Lessor reserves . . . the right to use or lease said premises, or any part thereof, at any time, for any purpose other than, but not to the detriment of the rights and privileges herein specifically granted; . . ."

As noted in the majority opinion, the lease also provided that it was subject to the rules and regulations of the DNR "now or hereafter in force" relative to such leases; but as noted, fn. 3, supra, there are no rules and regulations bearing on the issues of this case!

oil and gas leases by the DNR, the lands to be offered were reviewed by the various divisions of the DNR, including the Game Division, the Forestry Division, the Parks Division, and various divisions dealing with research and planning, to determine whether any of the lands described should either be withheld or offered for lease subject to special restrictions for the protection of special conservation interests and values. No withholding or restriction was recommended in the Pigeon River State Forest.⁵

After a number of wells had been drilled in the Forest, this viewpoint within the DNR was reversed. One need not be a mystic to divine from this record that the change of position did not result from expert research or evaluation in the operating levels of the DNR but was a determination to which the Commission itself had been led by concerned public opinion. Without admitting that leasing in the Forest had been error, claiming credit for itself for "an increased awareness of quality environment," and crediting public interest as "a recent development which makes it reasonable to deny" drilling permits,⁶ the DNR attempted to retrieve with its left hand that which it had sold with the right. The justification for denial of drilling permits was premised, notwithstanding an opinion of the Attorney General to the contrary,⁷ in an interpretation of the Oil Conservation

5. The majority's view that the departmental review was inadequate may or may not be true. This is neither an issue here, nor was it before the Commission. It is, however, to this stage of departmental procedure that reform should be directed rather than to legalistics over empty barn locks. See *"Should Trees Have Standing,"* Christopher D. Stone, Avon Books, New York, 1972.

6. Exhibit A-73, letter of the DNR director to supervisor of wells, July 20, 1972, ordering the supervisor to deny appellant's application for a drilling permit.

7. Counsel consulted too late are prone to advise in hindsight that the client should have had foresight. OAG 4718, April 6, 1971, concluded that control over environmental problems from oil and gas operations on state land lay in not leasing in the first place, the kind of lawyerism which drives most clients to ignore the answer they didn't want in the second place. So, too, the DNR.

Act by which the very acts of drilling for and producing oil and gas in a particular locale could be deemed "waste" as injurious to the environment.⁸

On May 31, 1972, appellant made its application to the supervisor of wells for a drilling permit pursuant to section 23 of the Oil Conservation Act. Although the application was in proper form, the supervisor failed to act on the application within five days as required by that section.⁹ He ultimately responded on July 21, 1972, saying that he had been ordered to deny the application by the Director of the DNR,¹⁰ who had said,

8. On June 11, 1971, the Commission adopted a policy statement, including the following:

2. . . .

b. Each oil and gas drilling permit application shall be judged on its own merits. When it is determined by the Department that the drilling at the location specified in the application will cause serious or unnecessary destruction of the surface, soils, animal, fish or aquatic life or unreasonably molest, spoil, or destroy state-owned lands, the permit may be denied by the supervisor of wells. Such findings shall be fully justified in writing.

9. 1973 PA 61 amended § 23 to extend to 10 days the period within which action on applications must be taken and § 3 to provide that thereafter the Director of the DNR rather than the state geologist would be the supervisor of wells.

10. The letter (exhibit A-74) of the supervisor, a DNR appointee, is a marvelous specimen of governmentalese by which he neither took personal action on the application nor expressed any reasoning or responsibility therefor. Rather, it commenced:

"I have been instructed by the Director of Natural Resources to deny your application for a permit", etc.

then quoting in its entirety the Director's letter so commanding him.

This procedure suggests several questions which have not been raised. Does the supervisor of wells exercise a ministerial or discretionary duty in acting on drilling permit applications? Clearly, if the DNR interpretation of the licensing procedure is accepted, the role of the supervisor is discretionary in the quasi-judicial sense, but just as clearly, he abdicated his discretionary power, merely relaying to the applicant the order given him by one who had no statutory role in the permit procedure.

(Footnote continued on next page.)

"Oil and gas operations at the above site cannot be conducted without causing or threatening to cause serious damage to animal life and molesting or spoiling state-owned lands.¹¹

Treating the letter as a denial of its application, appellant took its appeal to the Commission, whose new policy militated against drilling in the Forest and whose Director had ordered the supervisor of wells to deny the permit. The commission appointed an independent hearing examiner who took extensive testimony, personally visited the site on two occasions, and made detailed findings and conclusions of law sustaining appellant's position and recommending issuance of the drilling permit. His findings and report were rejected by the Commission which directed the Attorney-General to submit findings and conclusions to the contrary. Those proposed findings, derived in relevant part from the testimony of six DNR staff employees, were adopted by the Commission, which affirmed the denial of the permit.¹²

(Footnote continued from preceding page.)

Moreover, other provisions of the act were ignored, including the § 6 provision that the supervisor exercise his powers for the prevention of waste after consultation with the Oil and Gas Advisory Board, and the § 7 provision requiring hearing by the board "to determine whether or not waste is taking place or is reasonably imminent, and what action should be taken to prevent such waste."

It evinces a departmental predisposition to deny the application in spite of the act and not because of it, and might lead the uninitiated to suspect that appeal to the Commission would be fruitless.

11. From the letter of the Director, supra fn. 4.

The record discloses no basis for the Director's conclusion that stateowned lands would be molested or spoiled within the meaning of 1921 PA 17, and the DNR does not now so contend.

12. The pertinent portion of the Commission's findings, read as follows, transcript citations omitted:

Damage to the ecosystem and serious or unnecessary damage to animals would be caused by opening entrance roads, truck traffic, succession of wells and general activities encountered in an oil-gas production. Particularly, serious effects would be caused to elk, bear and bobcat and would cause their virtual

(Footnote continued on next page.)

Appeal on the record was taken to the Circuit Court of Ingham County which upheld the Commission's denial of the permit, and this appeal of right followed.

Is the Commission's finding of "damage to the ecosystem and serious or unnecessary damage to animals" supported by the record? Not in those terms. The record does not show the damage to animals to be unnecessary within the meaning of the act, and ecosystem damage as such is irrelevant under the act, of which more hereafter. I do not share the conclusion of the Circuit Judge that the testimony before the hearing examiner "overwhelmingly" supported the Commission's findings rather than those of the examiner. I find it, rather, a close question as to whether there is serious damage to animals, particularly if one may allow that the credibility of the opinions of the DNR employees upon which the findings turned was open to question. The hearing examiner obviously found those witnesses to be something less than infallible, and their opinions without credible foundation and inconsistent with the experience of other human activities in the area (fn 13 post); the Commission's findings, in the other hand, gave full faith and credit to their opinions and expertise, without which latter they doubtless would not have obtained nor kept departmental employment. Q.E.D.

(Footnote continued from preceding page.)

removal from a portion of the Pigeon River area. The tendency of the animals would be to avoid the area. Such effect would be particularly noticeable in the case of elk who are a wide ranging animal.

The Pigeon River area is the last stronghold of the bear and bobcat. Places where bear and bobcat can live are limited. Section 22 is good bear habitat.

Elk would be particularly affected by an oil operation because of their fragile nervous system and even clearing one acre will affect them. In turn, many small animals would be affected.

The above testimony from game biologists as to the effect of the drilling of a well in this area comes from the DNR presentation and the opinions of their experts are unrebutted on the record. On considering this foregoing testimony the Commission must find that damage to or destruction of the surface, soils, animals, fish or aquatic life will occur.

There is no dispute that the location of the proposed well is in the Pigeon River State Forest, that the Forest is the site of the only elk population in the lower peninsula of Michigan, and that it also provides good habitat for bear and bobcat. I find the Commission's findings of serious damage to animals supported by the record to the extent that there was substantial testimony from six DNR employees that : (a) the Forest may be the last area of size supporting bear and bobcat in the lower peninsula; (b) bear, bobcat and, particularly, elk, while they would not be directly injured by drilling or oil-gas production, would tend to avoid areas of such activity;¹³ and, (c) in consequence, the range and habitat of these animals would likely be reduced and their population would likely decline.

It is the contention of the Commission that the supervisor of wells, under the police powers provided by the Oil Conservation Act, may make a determination that the very act of drilling of oil and gas at a given location, and of there operating a producing well, however efficiently those operations may be conducted, may constitute waste per se, and that he may accordingly deny the right to so drill and operate. From the statutory duty imposed on the supervisor to prevent waste and a statutory definition of waste that includes "unnecessary damage to or destruction of the surface, soils, animal, fish or aquatic life

13. The testimony of the DNR game biologists indicated that these animals would tend to avoid man, manmade objects and human activities, of which there are already considerable in the Pigeon River State Forest (in large measure conducted, sponsored or licensed by the DNR), e.g., fishing, hunting, logging, motor-cycling, snowmobiling, and oil and gas wells. I note that the DNR experts in response to questions about the other human use of the Forest, contended that it has not permanently damaged the Forest or its wildlife, that it is reversible and that an excess of such permitted use in the past does not justify a greater use in the future but rather a reduction of such other use. Let us hope. So far as the granting of other drilling permits in the Forest, prior to or after the proceedings before the hearing examiner in this case, I accept the DNR position that it has been on a selective site by site evaluation, attempting to minimize the impact on the Forest of its previous illconsidered leasing.

or property from or by oil and gas operations," the Commission contends that the right to drill for and produce gas and oil may be denied wherever and whenever the supervisor determines that damage may be done to the ecosystem. I do not so read the act.

Apart from the pro tempore concern of 1939 with over production in a depression market as waste,¹⁴ the thrust of the Oil Conservation Act is to conserve oil and gas, preventing its waste or loss and promoting its efficient production. Thus, § 1, stating the policy of the act, concludes:

It is accordingly the declared policy of the state to protect the interests of its citizens and land owners from unwarranted waste of gas and oil and foster the development of the industry along the most favorable conditions and with a view to the ultimate recovery of the maximum production of these natural products. To that end this act is to be construed liberally in order that effect may be given to sound policies of conservation and the prevention of waste and exploitation. (CL '48, § 319.1.)

The primary definitions of "waste" subsurface and surface, deal with the literal waste or loss of oil and gas from inefficient or imprudent operating policies, and all of the specific powers given the supervisor of wells to prevent waste relate to the prevention of such operating practices or the requirement of sound practices. The conferred powers of the supervisor are for the regulation of production and not for its prevention.

The definition of waste is as follows:

As used in this act, the term "waste" in addition to its ordinary meaning shall include:

- (1) "Underground waste" as those words are generally understood in the oil business, and in any event to embrace (1) the inefficient, excessive, or improper use or dissipation of the reservoir energy, including gas energy and water drive, of any pool, and the locating, spacing, drilling, equipping, operating, or producing of any well or wells in

14. See §§ 2(1) (2) (3); 2(1) (3); 2(m)-(r); 12; 13.

a manner to reduce or tend to reduce the total quantity of oil or casinghead gas ultimately recoverable from any pool, and (2) unreasonable damage to underground fresh or mineral waters, natural brines, or other mineral deposits from operations for the discovery, development, and production and handling of oil or casing-head gas.

(2) "Surface waste", as those words are generally understood in the oil business, and in any event to embrace (1) the unnecessary to excessive surface loss or destruction without beneficial use, however, caused, of casing-head gas or other product thereof, but including the loss or destruction, without beneficial use, resulting from evaporation, seepage, leakage or fire, especially such loss or destruction incident to or resulting from the manner of spacing, equipping, operating, or producing well or wells, or incident to or resulting from inefficient storage or handling of oil, (2) the unnecessary damage to or destruction of the surface, soils, animal, fish or aquatic life or property from or by oil and gas operations; and (3) the drilling of unnecessary wells.

(3) "Market waste", which shall embrace the production of oil in any field or pool in excess of the market demand as defined herein.

Section 4 and 5 of the act speak only in general terms of waste, making it unlawful and within the authority and jurisdiction of the supervisor of wells: § 7 provides for a hearing before the advisory board "to determine whether or not waste is taking place or is reasonably imminent, and what action should be taken to prevent such waste."¹⁵ § 6 charges the supervisor of wells with prevention of "the waste prohibited by this Act" and enumerates his specific powers to deal therewith "after consulting with the (Oil and Gas Advisory) board."¹⁶ Nowhere therein is the power to deny a drilling permit to prevent future

15. As already noted, there was no such hearing in this case.

16. As already noted, there was no such consultation with the board in this case.

The specific powers granted as to waste, other than market waste, are:

(Footnote continued on next page.)

waste mentioned or suggested, nor does § 23 dealing with the issuance of permits suggest such a power. Nor has the supervisor of wells sought such a power by adopting rules and regulations which would so provide.

The act does recognize the risk of damage to water, mineral deposits, surface, soils, neighboring properties, life, or to animal, fish or aquatic life or property, from oil and gas operations and that the public interest warrants regulation to minimize such risk. Obviously such damages, and oil and gas exploitation in itself, have ecological significance. But nowhere in the act is the work "ecosystem" mentioned, nor "ecology", either in the definitions of waste or in other sections of the act dealing therewith or defining the powers of the supervisor of wells. It is significant that the legislature has demonstrated that it can, if it chooses, express an absolute ecological or environmental standard. Thus among the powers conferred on the supervisor in § 6(c) is the power.

"to prevent pollution, damage to or destruction of fresh water supplies including inland lakes and streams and the Great Lakes and connecting waters and valuable brines, by oil, gas or other waters, to prevent the escape of oil, gas or water into workable coal or other mineral deposits;"

But more typical of the act, and more realistic, is the following clause of § 6(c) giving the supervisor of wells the powers,

"to require the disposal of salt water and brines and oily wastes produced incidental to oil and gas operations, in

(Footnote continued from preceding page.)

1. The powers to make and enforce rules and regulations. § 6(a).

2. The powers of recordkeeping and data compilation. § 6(b), (d), (n).

3. The power to require some operating practices and prevent others. § 6(c), (e)-(k).

4. The power to issue emergency orders suspending "any operation or practice and the prompt correction of any condition found to exist which is causing a resulting or threatening to cause or result in waste." § 6(1) (under § 16 emergency orders issued without hearing are valid only for 21 days.)

such manner and by such methods and means that no unnecessary damage or danger to or destruction of surface or underground resources, to neighboring properties or rights, or to life, shall result," (emphasis added)

In so stating the supervisors power, the legislature recognized the necessary risks inherent in disposing of salt water, brines and oily wastes and authorized regulation to minimize them so that no unnecessary damage should result. The legislature has used a similar word, "unreasonable", in § 2(L)(1)(2) in describing subsurface damage as waste. So too, where dealing with production allocation and pooling, § 13 of the Act declares the drilling of unnecessary wells to be waste since they create fire and other hazards conducive to waste; since such risks are common to all wells, it is the unnecessary risk with which the legislature is concerned. The word "unnecessary" appears also in that portion of the statutory definition of surface waste upon which the Commission here relies:

"(2) 'Surface waste,' as those words are generally understood in the oil business, and in any event to embrace. . . .

(2) the unnecessary damage to or destruction of the surface, soils, animal, fish or aquatic life or property from or by oil and gas operations:"¹⁷

And while, after this controversy arose, the legislature has broadened this definition of waste by adding "other environmental values" to the interests to be protected from unnecessary damage or destruction,¹⁸ it did not choose to delete the word "unnecessary" from the definition or to provide an absolute standard for the protection of environmental values as it had done in § 6(c) for the protection of fresh waters and mineral deposits.

17. We would not suppose, and the Commission has not suggested, that "surface waste" is generally understood in the oil business to include ecological changes from, or the frightening away of wild animals by, oil and gas operations.

18. 1973 PA 61.

The Attorney General's 1971 Opinion to the then Director of DNR, followed by the hearing examiner, concluded that the act recognized that there was necessary damage or destruction consequent upon all oil and gas exploration and production and that what the act proscribed as unnecessary damage or destruction was that damage arising from careless or imprudent operations and which might be prevented by appropriate Precautions in such operations. That is is the ordinary sense of the words "necessary" and "unnecessary", i.e., that which is required or consequentially unavoidable versus that which does not follow as a matter of course and may be avoided.¹⁹

The Circuit Judge thought this dictionary definition of "necessary" and "unnecessary" to be too narrow, and that these were, instead, relative terms, saying:

"Whether or not damage is necessary . . . also concerns whether oil itself is necessary, or whether the oil is so necessary that other values must be subrogated * * * the denial of the permit could validly be based partially or entirely upon ecological considerations."

This I hold to be an erroneous interpretation of the statute. It would give to the enforcing officer, the supervisor of wells, the

19. The Commissions' conclusions of law avoided the question completely. It found factually (a) damage to the ecosystem; (b) serious or unnecessary damage to animals, and concluded "On considering this foregoing testimony the Commission must find that damage to or destruction of the surface, soils, animals, fish or aquatic life will occur" i.e., using the exact language of the act deleting the word, unnecessary.

The argument of the Commission on appeal makes no reference to the word "unnecessary"; rather, its brief in effect reads the word out of the statute and substitutes the word "serious", saying:

". . . the thrust of the (Attorney General's) opinion is aimed at the prevention of waste arising from careless and imprudent operations and damages that may be prevented by appropriate measures, and that, therefore, the appellant cannot be denied a permit.

It is our position, however, that (appellant's) operations in drilling and operation of the proposed well will cause serious damage to the elk, bear and bobcat which cannot be prevented by any 'appropriate measures.'

power to define waste and to do so according to his relative assessment of the competing values of oil and gas production versus ecological or other considerations. He is given no such power by the act, nor has he ever claimed such by his administrative rules and regulations. The question of whether oil and gas production is "necessary" was affirmatively answered by the act itself, as, indeed, it was answered by the various acts of the legislature authorizing the Commission to select state lands for oil and gas leasing.²⁰

Nothing in my view of the act, as confining the regulatory powers of the supervisor of wells to the establishment and enforcement of prudent operating practices and safety standards for the prevention of avoidable damage from ongoing operations, is altered by an examination of § 23 governing the issuance of drilling permits. There is no suggestion therein that a determination of feasibility, ecological or environmental acceptability, or of improbability of future waste of any kind is a prerequisite for the issuance of a permit. To the contrary, upon receipt of the required fee, acceptable bond and an application in proper form, issuance of the permit appears mandatory except where the applicant has not complied with or is in violation of the act or the rules, regulations, requirements or orders of the supervisor of wells. While there are rules and regulations relating to permit procedures, I have already noted that there are none dealing with ecological or environmental concerns of authorizing denial of drilling permits in anticipation thereof, nor are such concerns mentioned in the statutory powers given the supervisor to make requirements and orders.

I conclude that the damage to the ecosystem or serious damage to animals which the Commission found would result from oil and gas operations at Corwith 1-22 are not unnecessary within the statutory definition of waste, and that there is no

20. Most recently 1921 PA 17; MCLA 299.2; MSA 13.2. The power to make the value determinations which concerned the circuit judge does exist in the discretionary power thus conferred on the Commission to select state lands for oil and gas leasing.

power in the supervisor of wells under the statute to deny appellant's application for a drilling permit because of such anticipated damage.²¹

Moreover, while I think this construction of the act is both evident and sensible, were the act ambiguous I would be compelled to reach the same result in order to preserve its constitutionality.

"We cannot properly hold that the Legislature designed to commit such an act of injustice as to take away vested rights and destroy valuable existing interests. We are bound, if possible, so to construe statutes as to give them validity and a reasonable operation." *Van Fleet v. Van Fleet*, 49 Mich 610, 613, 14NW566 (1883).

The Commission acknowledges that by the lease, appellant acquired a valuable property interest. It denies appellant's claim that the denial of a drilling permit operates to deprive appellant of that property without just compensation in violation of § 2 of article 10 of our Constitution; rather, it asserts, it is merely exercising a police power to regulate the use of that property. But it seems fatuous to argue that because the lease conveying the oil and gas rights will run until 1978, the denial of the right to explore for oil and gas does not destroy its value. The action of the supervisor, if authorized by statute, would deprive the lease of all value.

Spanich v. City of Livonia, 355 Mich 252, 259, 94 NW2d 62 (1959), holding a zoning ordinance unconstitutional as depriving the affected parcel of land of any value for the zoned

21. In passing, I note the reference in the Commission's brief to the supervisor of wells as an independent officer and am constrained to comment that the handling of the Corwith 1-22 application does not indicate that the Commission or DRN Director have so viewed the office. Indeed, all briefs filed have referred to the supervisor, the DNR and the Commission interchangeably, as if they were the same. Although the 1973 amendments to the Oil Conservation Act now make the DNR director the supervisor of wells, the powers vested in him in the latter capacity belong to the office, not to the office of Director of the Commission.

use,²² delineated permissible police powers, saying "the legislation may only 'regulate'; it may not 'take' under the guise of regulation," citing *Arverne Bay Construction Company v. Thatcher*, 278 NY 222, 15 NE2d 587, 117 ALR 1110 (1938) which at p. 232 said:

"An ordinance which permanently so restricts the use of property that it cannot be used for any reasonable purpose goes, it is plain, beyond regulation, and must be recognized as a taking of the property."

Another case citing *Arverne* with approval was *Commissioner of Natural Resources v. Volpe & Co.*, 349 Mass 104, 206 NE2d 666 (1965), like the instant case involving claimed powers for conservation of ecological values, which claimed powers were rejected in the following language:

"The plaintiffs argue as though all that need be done is to demonstrate a public purpose and then no regulation in the interests of conservation can be too extreme. . . . An unrecognized taking in the guise of regulation is worse than confiscation."

Intervenors advance such arguments of public interest, citing *People v. Brodell*, 365 Mich 201, 112 NW2d 517 (1971) dealing with the public trust in submerged lands. But the public trust imposed on the state's fee title to the submerged lands of the Great Lakes has no counterpart in other state owned lands which may be bought and sold, leased or dealt with as by any private owner, and the power to sell oil and gas leases is expressly conferred by statute. Appellant does not deny, nor does this Court, the public interest in conservation of valued ecological and environmental interests. That public interest warranted the Commission from withholding lands in the Pigeon River State Forest from lease in the first instance had the Commission found it appropriate to do so. That public interest war-

22. See also, *Erwin Acceptance Company v. City of Ann Arbor*, 322 Mich 404, 34 NW2d 11 (1948); *City of North Muskegon v. Miller*, 249 Mich 52, 227 NW 743 (1929); *Kroph v. Sterling Heights*, 391 Mich 129, 215 NW2d 179 (1974).

rants regulation of private property under reasonable standards²³ for preservation and development of such environmental interests. That public interest warrants the expenditure of public funds for such purposes. And that public interest justifies the use of the power of eminent domain where necessary to accomplish those purposes. But no man's property may be taken from him to achieve those purposes without just compensation.

In a case similar to the one at hand, *Union Oil Co. of Cal. v. Morton*, 512 F2d 743 (CA9, 1975), a federal lease for offshore drilling with the right to erect a drilling platform had been sold to Union Oil Co. After one drilling platform caused a serious oil spill in the Santa Barbara Channel, an order of the Secretary of Interior suspended drilling rights in the area and denied Union the right to install another drilling platform. In remanding to the District Court, the Court made it clear that if the practical exercise of the lease was being denied indefinitely, such action of the Secretary must be overturned. After noting so that the Secretary had no powers of condemnation, the Court said, pp. 750-751,

"If, as Union contends, platform C is a necessary means for the extraction of oil from a portion of the leased area, refusal to permit installation of that platform now or at any time in the future deprives Union of all benefit from that lease in that particular area. We therefore conclude that an open-ended suspension of the right granted Union to install a drilling platform would be a pro tanto cancellation of its lease.

Such taking by interference with private property rights is within the constitutional power of Congress, subject to payment of compensation. * * But Congress no more impliedly authorized the Secretary to take the leasehold by prohibiting its beneficial use than by condemnation pro-

23. For the necessity of such standards, see *Hoyt Brothers, Inc. v. City of Grand Rapids*, 260 Mich 447, 245 NW 509 (1932). The absence of such standards here would be another constitutionally fatal flaw were the statute to be construed as the Commission contends, or were the Commission to be viewed as holding such powers as the majority opinion seems to find.

ceeding. A suspension for which the fifth amendment would require compensation is therefore unauthorized and beyond the Secretary's power."

The contention that Union is distinguishable from the instant case because appellant's lease contained a provision that it was subject to future rules and regulations applicable to such leases is quite beside the point since the Commission has failed to demonstrate that there is any applicable rule or regulation. It is a feeble effort to equate the act of a governmental officer with a properly adopted administrative rule or regulation; and if they were identical, it would be none the less totally destructive of the value of appellant's lease and an unconstitutional taking. That is the import of the decision of my brethren. See the opinion of Black, J., concurring in *Pigorsh v. Fahner*, 386 Mich 508, 515; 194 NW2d 343 (1972), and speaking of the "enormity" of a like governmental position in a similar public interest case.

I would reverse and direct the issuance of a drilling permit pursuant to appellant's application, with costs to appellant.

APPENDIX F

OPINION OF THE INGHAM CIRCUIT COURT

(Filed June 4, 1975)

(Caption omitted)

On October 1, 1968, the State of Michigan through the Department of Natural Resources sold an oil and mineral rights lease to Pan American Petroleum Corporation. On December 14, 1968, Pan American assigned fifty percent of such lease to Northern Michigan Exploration Company. The Department approved the assignment March 18, 1969. (While the standard lease requires Departmental consent to assignment, apparently consent is *pro forma* granted.)

On April 26, 1971, an application was filed for a permit to drill. The application was duly denied on October 11, 1971, for the stated reason that such drilling would cause "unnecessary damage" to the "surface, soils, or animal, fish or aquatic life."

Subsequently on January 28, 1972, the owners of the lease assigned it to McClure Oil Company, and the Department of Natural Resources stamped its approval on April 3, 1972. On May 19, 1972, McClure Oil farmed out to its wholly owned subsidiary, Michigan Oil Company.

Shortly thereafter, May 31, 1972, Michigan Oil applied for a permit to drill on the same tract that had previously been denied a permit. The application was denied July 21, 1972, for substantially the same reasons previously stated.

Michigan Oil requested and was granted a hearing that lasted from January 8, 1973, to February 21, 1973. The evidence consisted of the testimony of some twenty-five witnesses, 200 exhibits and 2,500 pages of testimony presented by Michigan Oil, the DNR and Pigeon River Country Association. Because

Pigeon River Country Association requested leave to intervene only one week before the scheduled hearing, the Hearings Examiner, in his sound discretion, limited their participation to issues set forth in the pretrial proceedings between Michigan Oil and the DNR. The Examiner also had the benefit of an "amicus" brief of West Michigan Environmental Council.

The Hearing Examiner recommended that the Natural Resources Commission (the governing agency of DNR) approve Michigan Oil's drilling permit application because even through the drilling may cause some disturbance to elk, bear, or bobcat the drilling would not have any more deleterious effect than other human activities in the area. He concluded the oil well drilling would therefore "not cause any serious or unnecessary damage or destruction to the surface, soils, fish or aquatic life or property, nor will it unreasonably spoil or molest state land." (Recommendation of Hearings Examiner, page 24)

On February 7, 1974, The Commission reviewed the recommendations and on April 12, 1974, they rejected the Hearing Examiner's recommendations. Their order of refusal to permit drilling on the tract was formally entered on May 9, 1974.

Petitioner Michigan Oil filed appeal to this Court on June 11, 1974, seeking a reversal of the Commission's decision and ordering the issuance of a drilling permit.

ISSUES PRESENTED

A. Does the Oil Conservation Act Require Granting of a Drilling Permit as a matter of right unless drilling would cause unnecessary damage to oil reserves or surface areas?

The pertinent statute is the Oil Conservation Act, 1939 PA 61; MCLA 319.1 et seq., which declares as its policy "the ultimate recovery of the maximum production of these natural products" but clearly and emphatically caveats that, "the declared policy of this state [is] to foster conservation of natural resources to the end that our citizens may continue to enjoy

the fruits and profits thereof", and, "this act is to be construed liberally in order that effect may be given to sound policies of conservation and the prevention of waste and exploitation." MCLA 319.1; MSA 13.139(1). This same section cites the "unwarranted slaughter and removal of magnificent timber" in Michigan's pioneer days as an example of what unsound conservation policies portend.

Section 4, MCLA 319.4; MSA 13.139(4) provides that it is "unlawful for any person to commit waste in the exploration for or in the development, production, or handling or use of oil or gas . . ." Section 5, MCLA 319.5; MSA 13.139(5) gives the Supervisor of Wells jurisdiction over "all matters relating to the prevention of waste and the conservation of oil and gas" and Section 6, MCLA 319.6; MSA 13.139(6) places an affirmative duty on the Supervisor to prevent waste.

Section 2(L), MCLA 319.2; MSA 13.139(2) defines "Waste":

"As used in this act, the term 'waste' *in addition to its ordinary meaning* shall include:

- (1) 'Underground waste' . . .
- (2) 'Surface waste' as those words are generally understood in the oil business, and in any event to embrace (1) the unnecessary surface loss or destruction without beneficial use . . . [resulting from evaporation, seepage, leakage or fire, etc.] (2) the unnecessary damage to or destruction of the surface, soils, animal, fish or aquatic life or property from or by oil and gas operations; and (3) the drilling of unnecessary wells." (emphasis added)

Section 23, MCLA 319.23; MSA 13.139(23) makes issuance of a permit to drill a well mandatory unless the applicant is in violation of the act, or any of the rules, regulations, requirements or orders issued by the Supervisor or the Department of Conservation.

The clear import of the above-quoted sections is that the Supervisor of Wells *shall* issue a permit to drill for oil *unless* such drilling would constitute "waste", and a specific example of waste is the "unnecessary damage or destruction" of life form.

In the law there are two kinds of "waste". They are generally referred to as "permissive waste" and "commissive waste." It is agreed by both parties that there is no question that Michigan Oil Company is qualified, experienced and expert in the drilling for oil. It is not contended that Michigan Oil will be negligent, or in any manner less prudent than another driller for oil. Permissive waste requires, at the least, a want of reasonable care. See *Bresnahan v. Hicks*, 260 Mich 32 (1932).

The type of "waste" that Michigan Oil might commit, if any, is commissive. Commissive waste does not require any showing that the tenant intends to cause damage or the like. In fact, acts that change the character of the estate may be waste even though the estate has an increase in value on account of the acts or changes. See *Anstays v. Anderson*, 194 Mich 1; 160 NW 475 (1916).

Waste as defined in Black's Law Dictionary is:

"spoil or destruction, done or permitted, to lands, houses, gardens, trees, or other corporeal hereditaments, by the tenant thereof, to the prejudice or their heir, or of him in reversion or remainder."

The Michigan Supreme Court in *In Re Seager Estate* put it succinctly. Judge McGrath said "It is not use, but abuse, that is waste", 92 Mich 186, 196; 52 NW 299; 16 LRA 247 (1892). In his scholarly opinion he makes it exceedingly clear that "waste" is determinable by a consideration of several relevant factors; i.e., the size and nature of the estate and remainder, and the nature of the property and surrounding area, as well as the complained of acts or omissions. *In Re Seagers Estate* held that mining iron ore (though presumably to the detriment of remaindermen) was not waste. The Court notes

that "Its principal value, and practically its sole value, is in the deposits of iron ore contained in it" 92 Mich 186, 187; 52 NW 299; 16 LRA 247 (1892). It appears certain the Court would have ruled contra if mining the ore would have, for example, required demolishing a magnificent and ancient cathedral or some other historic monument located above the ore deposits.

The statute specifically prohibits waste of a type that causes "unnecessary damage to or destruction of the surface, soils, animal, fish or aquatic life or property . . ." When is damage to the ecosystem "unnecessary" is a question suggesting no easy answer. Michigan Oil by their brief cite an Attorney General's advisory opinion (Opinion No. 4718 of April 6, 1971) that, according to Michigan Oil, stands for the proposition that the Oil Conservation Act is only aimed at preventing damage arising from "careless, imprudent operations and damages that may be prevented by appropriate measures." (Petitioner's Brief, page 9)

If this is in fact the Attorney General's position this Court must respectfully disagree. It appears to this Court that even inevitable damage done in the most careful and prudent manner may yet be "unnecessary" in certain circumstances. Whether or not damage is necessary is not simply a question of whether or not the oil can be extracted without damage, carelessly or negligently caused, it also concerns whether the oil itself is necessary, or whether the oil is so necessary that other values must be subrogated.

Given the stated intent of this legislature, the meanings generally attributed to "waste" and "unnecessary" and the statutory duty of the Supervisor of Wells, this Court is of the opinion that the denial of the permit to drill could validly be based partially or entirely upon ecological considerations. It is no complete answer to any that public policy demands that we develop and use our oil and gas natural resources. Wildlife and forests

are also natural resources and becoming more precious, unique and unexpendable each day.

B. Was Denial of a Drilling Permit Based on Illegal Zoning?

Michigan Oil contends that the denial of their permit to drill constitutes an illegal zoning. This is certainly a cogent argument if any governmental regulation whatsoever of the uses of land or buildings is a "zoning."

This is not this Court's understanding of the law of zoning. Some examples may be illustrative. If the government requires that proprietors of taverns close their doors at 2 a.m. this certainly certainly a regulation imposed upon the private property, yet it cannot fairly be called a "zoning." Similarly, if persons constructing homes for resale on property they own are required to use certain minimum quality materials they have been subjected to regulations in the interests of the health, education or welfare of the citizens of the state, but they have not thereby been subjected to a zoning statute.

In the instant case petitioner has been denied permission to drill for oil on property for which they have a mineral and oil leasehold interest. They have been denied permission because any drilling in this particular area would cause "unnecessary damage."

If the theory presented by petitioner is adopted, then any time an agency or bureau of the government attempts to gather and evaluate information for the purpose of formulating general policies, and they do not do so at the request of any interested party, but on their own initiative, they are "zoning" or "legislating without statutory power."

When the Department of Natural Resources determines that this "area" may not be drilled upon they are only doing their statutory duty. If they have "zoned", as the layman uses the term, their power is so severely restricted by statute as to take it from the legal definition. The Department is not by statute

granted unbridled discretion, but is commanded to act in accordance with ascertainable standards.

The fact that the act only permits the Supervisor of Wells five days in which to accept or deny an application for a permit to drill seems to indicate that the legislature intended that the Department would be investigating and considering areas prior to the time an application for a permit is filed.

It is concluded that the Department of Natural Resources may make determinations as to the statutory suitability of an area for drilling without, concomitantly, being involved in an illegal zoning.

C. Was Petitioner Denied Equal Protection By Having Permit Denied When Others in Area Were Granted?

Petitioners, having contended that considering the area in a comprehensive or co-ordinated manner was an illegal zoning since they should be handled on their own merits, now also contend that when the DNR treats them in particular or as an individual applicant, they are denied equal protection unless considered exactly the same as all others.

The U.S. Supreme Court in *Lindsley v Natural Carbonic Gas Co.*, 220 US 61, 78; 55 L Ed 369 (1910), provided a test for determining whether a statute or act denies equal protection:

"The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these:

1. The equal protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police law, but admits of the exercise of a wide scope of discretion in that regard, and validates what is done only when it is without any reasonable basis, and therefore is purely arbitrary.

2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality.

3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.

4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

Petitioners apparently contend that the denial of a permit is a denial of equal protection principally for two reasons.

First, a well has been approved as near as two and one-half miles from the proposed site. Petitioners point out that one of the DNR staff members testified that the proposed site and the site two and one-half miles away were "similar" (Tr. 2019) and that he had recommended approval of the other site (Tr. 2019). This standing alone would not be a sufficient showing of arbitrariness to constitute a denial of equal protection. In light of the same staff member going on to explain that shortly after the granting of the other site there was a moratorium and then a change in policy and further that in regards to the other site he was only permitted to consider damage to timber and road access (Tr. 2029) where he now, in conjunction with fishery and game biologists, is allowed to consider the entire ecostructure, and finally that the fisheries biologist and game biologist did not recommend approval of the other site, petitioners fall short of their burden.

Secondly, petitioners perceive a denial of equal protection in the now abandoned policy of the DNR that permitted ownership of land to be considered in the granting of a permit. Apparently the prior policy was to place greater restrictions or higher burdens upon those who drilled upon publicly owned land than those who drilled on privately owned land.

Petitioners have made no showing that this change in policy has denied them equal protection of the laws. In fact a non-arbitrary reason for such a policy seems readily apparent to the Court. For example, it has already been noted that the nature

and extent of a remainder interest is a valid consideration in the finding or prevention of waste. Just as persons who own land privately must look after their own remainder interest, so must the state concern itself with the remainder interest of Michigan's citizens. This duty would be present even absent the ecologically based considerations in determining waste.

This Court finds no violation of equal protection.

D. Was the Denial of a Drilling Permit a Confiscation of Petitioner's Property Rights Without Condemnation by Due Process of Law?

Petitioner also contends that when the permit was denied the property lost its primary value and that this amounted to an unconstitutional taking of private property for public use without condemnation proceedings in accordance with due process of law.

At the outset the Court might note that we have no understanding that the property would lose its primary value by the denial of drilling permits; the Court has no evidence before it to that effect. We do understand, however, that the petitioner's property interest is entirely valueless without the granting of a drilling permit. And, secondly, the concept value is not exclusively confined to economic considerations.

Petitioner cites a line of zoning cases that unambiguously state that "a zoning ordinance that renders property almost worthless is unreasonable and confiscatory, and therefore illegal." *Ervin Acceptance Co. v Ann Arbor*, 322 Mich 404, 408; 34 NW2d 11 (1948). Nor may the state "in the name of the police power, require a property owner to refrain indefinitely and without payment from enjoying and using his property." *Gordon v Warren Planning Commission*, 388 Mich 82, 91; 199 NW2d 465 (1972).

On the antipodal the courts have held ". . . that the lessee shall be subject to such interference or disturbance of his pos-

session as results from the exercise of the police power . . .” *Tucker v Groic*, 344 Mich 319, 323; 74 NW2d 29; 41 ALR2d 1414 (1955), and “[i]t is fundamental that ‘where the exercise of the police power is applicable, the provision of the Constitution declaring that property shall not be taken without due process of law is inapplicable.’” *People v Raub*, 9 Mich App 114, 118; 115 NW2d 878 (1967). See also *Wyant v. Director of Agriculture*, 340 Mich 602, 608; 66 NW2d 240 (1954), and *People v Damm*, 183 Mich 554; 149 NW 1002 (1914).

The problem, of course, is that both positions incorrectly state the law when the questions are viewed in a vacuum or out of a meaningful context. The state *may* require a property owner to refrain from certain uses of his property without compensating him in certain circumstances and a person who has had his property confiscated is not without all due process protection. Both positions must have “reasonableness” read into the language.

The Michigan Supreme Court in *Spanich v City of Livonia*, 355 Mich 252, 259-260; 94 NW2d 62 (1959), laid down sensible guidelines in viewing municipal action. They seem appropriate here:

“First, the legislation may only ‘regulate;’ it may not ‘take’ under the guise of regulation. See *Arverne Bay Construction Co. v Thatcher*, 278 NY 222 (15 NE2d 587, 117 ALR 1110). Secondly, the regulation must bear a direct and substantial relation to the objectives of the police power (the preservation of the public health, safety, morals and general welfare of the community as a whole). See *Long v City of Highland Park*, 329 Mich 146. Finally, the regulation, in its impact upon the individual property owner, must not be arbitrary, unreasonable or discriminatory. See *Hitchman v Township of Oakland*, 329 Mich 331.”

These guidelines must be read in the light of the admonition that:

“The ‘police power’ . . . has for its object the improvement of social and economic conditions affecting the community

at large and collectively with a view to bring about ‘the greatest good of the greatest number.’ Courts have consistently and wisely declined to set any fixed limitations upon subjects calling for the exercise of this power. It is elastic and is exercised from time to time as varying social conditions demand correction.” *People v Raub*, 9 Mich App 114, 119; 155 NW2d 878 (1967) quoting *People v Brazee*, 183 Mich 259, 262; 149 NW 1053; LRA 16E 1146

So, in this context the Court must first ask, was the denial of the use of petitioner’s property no more than a “taking” of their property under the guise of regulation? Or, was there some valid regulatory motive behind the denial?

The statute and the record bring this Court to conclude there was a legitimate regulatory purpose in denying Michigan Oil the permit to drill.

Second, does the regulation bear a direct and substantial relation to the objective of the police power, namely, the preservation of the public health, safety, morals, and general welfare of the community as a whole? With the understanding that the police power is an elastic concept concerned with “the greatest good of the greatest number” this Court does not hesitate in finding that today (if indeed this has not always been so) aesthetic and ecological factors do have a direct and substantial relationship to the general welfare of the community as a whole.

Finally, is the impact of this regulation arbitrary, unreasonable or discriminatory as to Michigan Oil Company? Again, this Court finds the regulation neither arbitrary, nor without reason, nor does it treat Michigan Oil differently from others in their situation and, therefore, act in a discriminatory manner.

E. Was the Denial of the Permit an Unlawful Impairment of Contract?

Petitioners next argue that the State, by selling them a lease that they were unable to use has breached its contract and that

this action has "impaired the obligation of contracts" in violation of Article I, §10 of the Michigan Constitution. First, the Michigan Constitution provides that "*no bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted.*" But we are not here confronted with a bill of attainder, an ex post facto law, or any other type of law.

Secondly, petitioner has apparently commingled two distinct concepts that are not so readily fungible: Breach of contract and impairment of the obligation of contracts. There is no breach of contract for the very simple reason that the petitioner and the Supervisor of Wells had no contract and even if the Supervisor of Wells and the Lands Division were in privity (though they are not necessarily) there is no contractual obligation on the part of the Lands Division to issue a permit, something they are in fact without authority to do. This Court perceives no breach of contract unless it be based upon an equitable estoppel theory, to be discussed directly.

The prohibition against the state enacting laws impairing the obligation of contracts is quite different from the state allegedly breaching its own contracts. The constitutional prohibition is against the state enacting laws that alter already existing contractual obligations without regard to whether the state is one of the contracting parties. An important and repeatedly emphasized caveat to the above statement is the principle that "[t]he doctrine of unconstitutional impairment of the obligations of contracts cannot be extended to the exercise of the constitutional power of the legislature to legislate in matters of state concern." *Ecorse v People C. Hospital Authority*, 336 Mich 490, 503; 58 NW2d 159 (1953). See also *Harsha v Detroit*, 261 Mich 586; 246 NW 849; 90 ALR 853 (1933).

The denial of a permit to drill does not violate the constitutional "impairment of contracts" prohibition.

It might be noted parenthetically that petitioner still holds the oil lease rights and should there come a time that oil exploration technology makes it possible to drill State Corwith 1-22

without this degree of ecological destruction, petitioner may acquire a permit to so drill.

F. By Selling An Oil Lease Is the State Thereby equitably Estopped from Denying Drilling Permits?

Petitioner, in addition, claims that the state should be equitably estopped from denying a permit to drill. This theory is that when the Lands Division sold the lease to Pan American Petroleum Corporation they were concurrently promising that the Supervisor of Wells would issue a permit to drill.

The Michigan definition of equitable estoppel is presented in *Holt v Stofflet*, 338 Mich 115, 119; 61 NW2d 28 (1953).

"It is a familiar rule of law that an estoppel arises when one by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts."

The elements of equitable estoppel are then, first, a culpable holding out by one of a certain factual situation. As this Court has stated, there is no evidence that the Lands Division Guaranteed the Supervisor of Wells would issue a permit to drill.

The Court does note that the DNR methods might be improved. The Court could conceive of a situation where a novice natural person or business firm might not realize the necessary second step of obtaining a permit and would thereby be prejudiced by a policy appearing to him as chicanery. The DNR might do well to put a very express disclaimer in its oil leases and other similar conveyances to this effect.

Second, the person to whom the representation has been made must rightfully rely on such facts. DNR made no factual representations to Michigan Oil. Recall that the lease was originally sold to Pan American Petroleum Company, who sold to North-

ern Michigan Exploration Company, to whom the permit was originally denied. It then passed to McClure Oil Company, who farmed out to Michigan Oil, the petitioner. Perhaps Northern Michigan Exploration Company should have made the fact of prior denial known to McClure Oil Company, who should have made such fact known to Michigan Oil; perhaps they did make such fact known and perhaps it is a matter of public record. Such a question is not before the Court. But, based on Michigan Oil's acknowledged expertise in the industry and the factual setting of this case, the Court can find no holding out of erroneous facts to Michigan Oil, nor justifiable reliance on their part.

Indeed, Mr. Orr, President of Michigan Oil, testified that he learned of the State Corwith in question through his capacity as a member of the Oil and Gas Advisory Board of the Supervisor of Wells (Tr. 215), and he further testified that he knew of the prior refusals of a permit when Michigan Oil purchased the lease (Tr. 217) and indeed it was purchased *because* a permit had previously been denied (Tr. 217). In other words, Michigan Oil took a chance and lost.

G. Was the Denial of the Drilling Permit An Arbitrary Abuse of Discretion and Contrary to the Evidence on the Whole Record?

The Commission made the following findings of fact:

"The testimony shows that in the Pigeon River area are found deer, bear, bobcat, elk and game birds. The Michigan elk range, which includes Corwith Township, covers approximately 600 square miles of territory, and is bounded by I-75 on the west, M-68 on the north, M-33 on the east, and M-32 on the South (*Moran*, T-2184). The elk population is between 500 and 1,000 animals (*Johnson*, T-1821). Bear numbers from 30 to 50 (*Johnson*, T-1822). The Pigeon River area furnishes good habitat for wildlife. "Damage to the ecosystem and serious or unnecessary damage to animals would be caused by opening entrance roads,

truck traffic, succession of wells and general activities encountered in an oil-gas production. Particularly, serious effects would be caused to elk, bear and bobcat and could cause their virtual removal from a portion of the Pigeon River area. The tendency of the animals would be to avoid the area. Such effect would be particularly noticeable in the case of elk who are a wide ranging animal (*Moran*, T-2142; *Harger*, T-2243; *Black*, T-1331, 1332, 1333, 1352; *Moore*, T-1710; *Johnson*, T-1782, 1784-1786, 1819, 1924; *Strong*, T-1823, 1824).

"The Pigeon River area is the last stronghold of the bear and bobcat. Places where bear and bobcat can live are limited. Section 22 is good bear habitat (*Johnson*, T-1786, 1823; *Harger*, T-2246).

"Elk would be particularly affected by an oil operation because of their fragile nervous system and even clearing one acre will affect them. In turn many small animals would be affected (*Johnson*, T-1823; *Strong*, T-1888, 1889; *Moran*, T-2152).

"The above testimony from game biologists as to the effect of the drilling of a well in this area comes from the DNR presentation and the opinions of their experts are un rebutted on the record. On considering the foregoing testimony the Commission must find that damage to or destruction of the surface, soils, animals, fish or aquatic life will occur."

The expert of the petitioner views the effect of drilling otherwise. Mr. Manthy testified that there would be only *de minimus* damage to the food and cover in the area surrounding the well site (Tr. 917) and would have an almost insignificant effect on the wildlife (Tr. 919).

However, the Court has reviewed the entire voluminous transcript, and even given Mr. Manthy's contrary view of the facts and the Hearing Examiner's opportunity to view the demeanor of the witnesses, the record overwhelmingly supports the opinion and decision of the Commission.

CONCLUSION

For the above stated reasons the decision of the Commission is affirmed. An order may enter consistent with this Opinion and if not accomplished within thirty days, this Opinion shall serve as the order of the Court.

/s/ Thomas L. Brown, Circuit Judge

Dated: June 4th, 1975.

APPENDIX G

Findings of Fact
Conclusions of Law
and Order

STATE OF MICHIGAN
Natural Resources Commission

IN THE MATTER OF THE APPEAL FROM DENIAL OF
APPLICATION BY MICHIGAN OIL COMPANY FOR
PERMIT TO DRILL STATE CORWITH #1-22

The Commission having reviewed the record, briefs, proposed findings of fact, as submitted by the parties and the hearing officer, Fredric Abood, and having heard the oral arguments, and after due deliberation thereon, rejects the findings of fact and conclusions of law and recommendations of the hearing officer, and believes that the denial of the Supervisor of Wells of the application for drilling permit, heretofore filed by the Michigan Oil Company of Alma, Michigan, on May 31, 1972, should be affirmed.

Further, all offered findings of the petitioner, as they may conflict with the findings proposed by the Attorney General, are hereby rejected. The said Commission also makes the following findings of fact and conclusions of law.

FINDINGS OF FACT.

The area in question involves a lease covering lands in Otsego County. The lease is on the usual State of Michigan form, prepared by the Department (Wood, T-146, 299, 308). The lease was given for ten years. Pan-American Petroleum Corporation, the original lessee, on December 14, 1960 assigned 50% of such lease to Northern Michigan Exploration Company,

(Exhibit A-29, A-44). By subsequent assignment dated January 28, 1972, the owners of such lease assigned the same to McClure Oil Company, as such lease covered the South $\frac{1}{2}$ of the Southeast $\frac{1}{4}$ of Section 22, the site of the State-Corwith # 1-22 (Exhibit A-30, A-45). After such assignment, a farm-out agreement dated May 19, 1972, was entered into between McClure and its wholly owned subsidiary, Michigan Oil Company (Exhibit A-34; Orr, T-177 to 182).

The record indicates that an application to drill the SW $\frac{1}{4}$ of the SE $\frac{1}{4}$ had been made by Northern Michigan Exploration Company and Amoco Production Company on April 26, 1971. The application was turned down on the grounds that oil and gas operations could not be conducted without causing, or threatening to cause, serious or unnecessary damages, that injury would be caused to deer, elk, black bear, bobcats, grouse and woodcock; also, that the area was primitive in nature; and finally, that pipelines could affect the swamp and in general, cause a serious intrusion into a nearly solid block of semi-wilderness area of State lands (Exhibits D-14, D-18). The denial specifically stated that no other site in the 40 acres was acceptable.

The present application to drill on the same 40 acres was made on May 31, 1972 by Michigan Oil Company of Alma, Michigan. The well site, described as the center of the SE $\frac{1}{4}$ of the SW $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Section 22, T 32 N, R 1 W, Corwith Township, Otsego County, Michigan, is located upon land in the Pigeon River State Forest which is owned in fee by the State of Michigan (Orr, T-176; Exhibit D-1). This land was leased for oil and gas purposes by the Department of Conservation at the public lease sale held by the Department in August of 1960.

By letter dated July 21, 1972, Michigan Oil's application for drilling permit was denied by the Supervisor of Wells, Arthur E. Slaughter (Exhibits A-73, A-74; Slaughter, T-781-783; Harris, T-1137, 1138, 1144, 1147). The denial letter (Exhibit A-74) stated:

"Oil and gas operations at the above site cannot be conducted without causing or threatening to cause serious damage to animal life and molesting or spoiling state-owned lands. On September 23, 1971, I instructed you to deny an earlier application by another company to drill at another site on this same 40-acre tract. I then noted that no suitable alternate site on this parcel could be acceptable. The conditions that led me to that decision have not changed. Consequently, I instruct you to deny the present permit."

Thereafter, on July 28, 1972, under the provisions of Section 3 of Act 61 of the Public Acts of 1939, as amended, MCLA 319.3, MSA 13.139(3), Michigan Oil appealed such denial to the Natural Resources Commission (hereinafter referred to as the Commission). There was, however, no request for a hearing on the application, pursuant to the Administrative Procedures Act, prior to its denial (Harris, T-1149). Likewise, there was no request for a hearing on denial of prior application to drill in the same forty filed by Northern Michigan Exploration Company and Amoco.

The Commission appointed Fredric S. Abood, an attorney at law of Lansing, Michigan, to conduct a hearing in this matter and report to the Commission his findings and recommendations. The parties initially concerned in the hearing were Michigan Oil Company and the Department of Natural Resources (hereinafter referred to as DNR). The Pigeon River Country Association appeared thereafter as an Intervenor.

The DNR and Intervenor claimed that the proposed well will cause unnecessary damage within the statutory definition of waste under Act 61, P.A. 1939, as amended, and Department policies and applicable rules and regulations.

Michigan Oil claimed that it would drill the well in a prudent manner and that it would not cause any unnecessary damage and that the denial of the permit was an abuse of discretion.

The hearing commenced on January 8, 1973 and concluded February 21, 1973. Testimony was taken in 20 days, resulting

in a transcript of over 2,500 pages. 25 witnesses testified and over 200 exhibits were admitted in evidence.

It appears from the findings presented by the parties and from those submitted by the hearing officer that numerous issues and legal questions were raised during the 20 days of hearing, but none of the facts need to be reviewed in this opinion by the Commission or specific findings of fact and conclusions of law be made thereon except as may be set out in these findings.

The testimony shows that in the Pigeon River area are found deer, bear, bobcat, elk and game birds. The Michigan elk range, which includes Corwith Township, covers approximately 600 square miles of territory, and is bounded by I-75 on the west, M-68 on the north, M-33 on the east, and M-32 on the south (Moran, T-2184). The elk population is between 500 and 1,000 animals (Johnson, T-1321). Bear numbers from 30 to 50 (Johnson, T-1822). The Pigeon River area furnishes good habitat for wildlife.

Damage to the ecosystem and serious or unnecessary damage to animals would be caused by opening entrance roads, truck traffic, succession of wells and general activities encountered in all oil-gas production. Particularly, serious effects would be caused to elk, bear and bobcat and could cause their virtual removal from a portion of the Pigeon River area. The tendency of the animals would be to avoid the area. Such effect would be particularly noticeable in the case of elk who are a wide ranging animal (Moran, T-2142; Harger, T-2243; Black, T-1331, 1332, 1333, 1352; Moore, T-1710; Johnson, T-1782, 1784-1786, 1819, 1924; Strong, T-1823, 1824).

The Pigeon River area is the last stronghold of the bear and bobcat. Places where bear and bobcat can live are limited. Section 22 is good bear habitat (Johnson, T-1786, 1823; Harger, T-2246).

Elk would be particularly affected by an oil operation because of their fragile nervous system and even clearing one

acre will affect them. In turn, many small animals would be affected (Johnson, T-1823; Strong, T-1888, 1889; Moran, T-2152).

The above testimony from game biologists as to the effect of the drilling of a well in this area comes from the DNR presentation and the opinions of their experts are unrebutted on the record. On considering the foregoing testimony the Commission must find that damage to or destruction of the surface, soils, animals, fish or aquatic life will occur.

CONCLUSIONS OF LAW

Section 3 of Act 17 of the Public Acts of 1921, as amended, MSA 13.3; MCLA 299.3 provides in part as follows:

"The Department of Conservation shall protect and conserve the natural resources of the State of Michigan; provide and develop facilities for outdoor recreation; prevent the destruction of timber and other forest growth by fire or otherwise; promote the reforestation of forest lands belonging to the state; prevent and guard against the pollution of lakes and streams within the state, and enforce all laws provided for that purpose with all authority granted by law, and foster and encourage the protecting and propagation of game and fish . . ." (MSA 13.3, MCLA 299.3)

The foregoing responsibilities of the Department must be discharged in the light of Section 4 of Act 61 which prohibits waste, and waste is defined in Section 2 as follows:

"(2) 'Surface waste,' as those words are generally understood in the oil business, and in any event to embrace . . . (2) the unnecessary damage to or destruction of the surface, soils, animal, fish or aquatic life or property from or by oil and gas operations; . . ." (MSA 13.139(2), MCLA 319.2)

The Department is required to protect and conserve natural resources and game pursuant to Act 17, *supra*. *If the Depart-*

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ment had not opposed the application for permit it would have failed in performance of this duty.

The game of the State belong to the people and the State is the trustee of such game; *People v. Zimberg*, 321 Mich 655 (1948).

The testimony indicates that if the well is permitted that waste will occur and consequently should be denied in the exercise of this Commission's discretion.

We believe that the action in this case under the police power is justified. The case of *Commonwealth v. Trent, et al*, 117 Ky 34, 77 SW 390 (1903) said that property is the creation of law. The law of property may be regulated by law. The legislature may protect from waste the natural resources of the State which are the common heritage of all. The right of the owner of property to do with it as he pleases is subject to the limitation that he must have due regard for the rights of others.

Statutes controlling waste have been held constitutional; *Walls v. Midland Carbon Co.*, 254 US 300 (1920). Such statutes have been held not to constitute a taking of property; *Ohio Oil Co. v. Indiana (No. 1)*, 177 US 190 (1900). They do not deny the equal protection of laws; *Lindsley v. Natural Carbonic Gas Co.*, 220 US 61 (1911). Finally, they have been said not to impair existing contract obligations; *Walls v. Midland Carbon Co.*, *supra*.

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ORDER

The action of the Supervisor of Wells in denying the drilling permit is upheld on the ground that to permit drilling will cause waste and constitute violation of Act 17, *supra*, and Act 61, *supra*.

Further, that the amount paid for the lease on the 40 acres in question may be refunded or in the alternative that Michigan Oil request and be given the opportunity to execute a non-development lease on the 40 acres in question.

NATURAL RESOURCES COMMISSION

By /s/ Hilary F. Snell

Chairman, Natural Resources Commission

Dated May 9, 1974

Lansing, Michigan

APPENDIX H

April 16, 1974

Jerome Maslowski
Assistant in Charge
Environmental Protection & Natural Resources
Department of Attorney General
Law Building
Lansing, Michigan 48913

Byron Gallagher, Attorney
201 North Main
Mt. Pleasant, Michigan 48858

Peter J. Vellenga
303 East Main Street
Gaylord, Michigan 49735

Gentlemen:

On April 12, 1974, the Natural Resources Commission passed the following motion:

"Motion that the Natural Resources Commission set aside the Hearing Examiner's Report and uphold the denial, by the Supervisor of Wells, of a permit to drill an oil well known as Corwith #1-22."

The Commission also asked the Attorney General's office to prepare an order with appropriate findings of fact, setting aside the hearing examiner's report and upholding the Supervisor of Wells' denial of the permit.

Sincerely,

/s/ Charles J. Guenther
Executive Assistant

cc: Stu Freeman

APPENDIX I

May 14, 1974

Mr. Byron S. Gallagher
201 North Main Street
Mt. Pleasant, Michigan 48858

Mr. Peter Vellenga
303 East Main Street
Gaylord, Michigan 49735

Mr. Jerome Maslowski
Assistant Attorney General
Lansing, Michigan 48926

Gentlemen:

The Natural Resources Commission asked me to inform you that they accepted and approved the findings of fact and conclusions of law and the order prepared by the Attorney General as their findings, and the Chairman was instructed to sign the order.

I am attaching a copy of the order.

Sincerely,

/s/ Charles J. Guenther
Executive Assistant

APPENDIX J

Hearing Examiner's Findings of Fact Conclusions of Law and
Recommendation

INDEX**FINDINGS OF FACT:**

Introduction
Leasing State Lands for Oil and Gas Purposes
Public Lease Sale in August of 1968
The Oil and Gas Lease
The Oil and Gas Well
Well Site and Surrounding Area
Permit Procedure
Effect of Proposed Well
(Table of Comparative Well Locations)
Permits for Private Wells

CONCLUSIONS OF LAW:

Answer to Other Issues Set forth by
Intervenor

1. Assignment
2. Farmout Agreement
3. Waiver

Unnecessary Damage
Molestation and Spoliation
Equal Protection

RECOMMENDATION:

List of Michigan Oil Exhibits
List of DNR Exhibits
List of Pigeon River Assn. Exhibits

Schedule I

Schedule II

List of Witnesses called by Michigan Oil

List of Witnesses called by DNR

List of Witnesses called by Pigeon River
Assn.

CITATIONS**STATUTES and RULES:**

Act 61 of the Public Acts of 1939
(MCLA 319.1, et seq; MSA
13.139-1, et seq)

Section 2 of Act 17 of the Public
Acts of 1921 (MCLA 299.2;
MSA 13.2)

Section 3a of Act 17 (MCLA 299.3a;
MSA 13.4)

Administrative Procedures Act
(MCLA 24.201; MSA 3.560)

Michigan Administrative Code
R. 299.1101

CONSTITUTION:

United States Constitution
Article XIV, Section 1

REFERENCES:

58 CJS 843 (Molestation)
81 CJS 836 (Spoliation)
91 CJS 505 (Unnecessary)
2 Am Jur 2d, 26
16 Am Jur 2d 849, 855
28 Am Jur 2d 836
Attorney General Opinion No. 4718

CASES:

Smith v. Township of Norton, 319 Mich 365
 Great Lakes Realty v. Turner, 190 Mich 582
 Miller v. Pond, 214 Mich 186

FINDINGS OF FACT

On May 31, 1972, Michigan Oil Company of Alma, Michigan, applied for a permit to drill an oil and gas well, known as the State-Corwith 1-22. The well site, described as:

the center of the SE ¼ of the SW ¼ of the SE ¼ of Section 22, T 32 N, R 1 W, Corwith Township, Otsego County, Michigan;

is located upon land in the Pigeon River State Forest, which is owned in fee by the State of Michigan (Orr, T-176; Ex.D-1). This land was leased for oil and gas purposes by the Department of Conservation at the public lease sale held by the Department in August of 1968.

By letter dated July 21, 1972, Michigan Oil's application for drilling permit was denied by the Supervisor of Wells, Arthur E. Slaughter, at the direction of the Director of Natural Resources, Ralph A. MacMullan.¹ The denial letter (Ex. A-74) stated:

Oil and gas operations at the above site cannot be conducted without causing or threatening to cause serious damage to animal life and molesting or spoiling state-owned lands. On September 28, 1971, I instructed you to deny an earlier application by another company to drill at another site on this same 40 acre tract. I then noted that no suitable alternate site on this parcel could be acceptable. The conditions that led me to that decision have not changed. Consequently, I instruct you to deny the present permit.

1. Exhibits A-73 and A-74; Slaughter, T-781 to 783, Harris, T-1137, 1138, 1144, 1147.

Thereafter, on July 28, 1972, under the provisions of Section 3 of Act 61 of the Public Acts of 1939, as amended,² Michigan Oil appealed the denial to the Natural Resources Commission (herein referred to as the Commission); and Fredric S. Abood, Attorney at Law, was appointed as the Hearing Officer for the purpose of taking testimony *In the Matter of the Appeal from Denial of the Application of Michigan Oil Company for Permit to Drill State-Corwith No. 1-22.*³

The Hearing commenced on the 8th day of January 1973, and concluded on the 21st day of February, 1973.⁴ Testimony was taken for twenty days, resulting in a transcript of over twenty-five hundred pages. Twenty-five witnesses testified, and over two hundred exhibits were admitted into evidence.

2. MCLA 319.3; MSA 13.139-3;

3. Letter dated January 5, 1973, appointing Hearing Officer:

Mr. Fredric S. Abood
 Abood, Abood & Abood
 117 East Allegan Street
 Lansing, Michigan 48933

Dear Sir:

Pursuant to the provisions of Act 61 of the Public Acts of 1939, as amended, being MCLA 319.1 et seq, and Act 306 of the Public Acts of 1969, as amended (The Michigan Administrative Procedures Act) being MCLA 24.201 et seq, MSA 3.560 (101) et seq, you are hereby appointed by the Michigan Natural Resources Commission and the Director of the Department of Natural Resources as Hearings Officer for the purpose of taking testimony in the Matter of the Appeal from Denial of the Application of Michigan Oil Company for Permit to Drill State-Corwith No. 1-22.

Upon hearing said matter you are requested to prepare a proposal for decision, including separately stated findings of fact and conclusions of law and serve said proposal upon the parties in accordance with the requirements of Section 81 of Act 306, being MCLA 24.281, MSA 3.560 (181).

Very truly yours, (signed A. Gene Gazlay, Director

4. Final arguments were held on July 12, 1973, at Gaylor, Michigan.

The parties initially concerned in the hearings were:

- (1) The Michigan Oil Company;
- (2) The Department of Natural Resources; and
- (3) The Pigeon River Country Association as Intervenor.

The only parties involved in this matter at the outset, however, were, Michigan Oil Company, and the Attorney General's office representing the Department of Natural Resources (hereinafter referred to as DNR). Approximately one week before the hearing, a Petition to Intervene was filed by the Pigeon River Country Association. Prior to that time, the issues to be heard had been set forth in meetings between the parties of record and in their Pre-Trial Statements filed with the Hearing Offices.

The Pigeon River Association filed their Petition to Intervene approximately one week before the hearing, although aware of the pending appeal for several months. Intervenor's Petition and accompanying pleadings attempted, at the late date, to raise new and different issues. Michigan Oil Company objected to the intervention as not timely, and because Intervenor lacked standing.

Intervention was permitted on the basis that Intervenor not raise issues other than those set forth in the Pre-Trial proceedings (T-16 and 17). Michigan case law is to the effect that intervention is subordinate to the pending proceeding. In *Smith v. Township of Norton* 319 Mich 365, we find the following, on page 371:

In accord with the foregoing we have held:

'In the case of intervention, the invervener [sp.] . . . may introduce testimony and be heard; he must, of course, take the case as he finds it, and cannot question the propriety of the proceedings . . .

Whether intervention is a matter of right or is discretionary, there must be timely application, and intervention is permitted only in such manner as not to impede or delay the pending

proceedings.⁵ Conditions may be imposed on intervention even though the intervention is of right rather than permissive intervention.⁶

Act 61 governs the drilling and operation of oil wells in Michigan, and designates a Supervisor of Wells to carry out the provisions of the statute and rules and regulations⁷ pertaining to such wells, including the prevention of waste. DNR employee, Arthur E. Slaughter, is the Supervisor of Wells. No well may be drilled except under drilling permit issued by the Supervisor. Waste is prohibited by the statute, and the following definition of waste appears in Section 2: (MCLA 319; MSA 13.139-2):

- (2) 'Surface waste', as those words are generally understood in the oil business, and in any event to embrace . . .
- (2) the *unnecessary damage to or destruction of the surface, soils, animal, fish or aquatic life* or property from or by oil and gas operation . . . [emphasis added]

The DNR and Intervenor claim that the proposed well will cause unnecessary damage within the statutory definition of waste and applicable rules and regulations; hence, the Supervisor denied Michigan Oil's application for permit to drill.

Michigan Oil Company claims that:

1. Michigan Oil will drill and operate the State-Corwith 1-22 in a careful and prudent manner, and in conformity with Act 61 and all applicable rules and regulations.
2. The drilling and operation of the proposed well will not cause unnecessary damage to or destruction of the surface, soils, animal, fish or aquatic life or property.
3. Michigan Oil has been treated unfairly for the reason that, while denying its application for permit, the Supervisor granted

5. Par. 1913 of *Federal Practice and Procedure* (Wright & Miller), as to Rule 24 of the Federal Rules of Civil Procedure, from which GCR is copied.

6. Par. 1922 (Page 624 of *Federal Practice and Procedures*, above.

7. Michigan Administrative Code, R 299.1101 and following.

a number of drilling permits in the same area for comparable locations.

4. Denial of the permit was arbitrary, inequitable and unreasonable.

5. Denial of the permit was an abuse of discretion.

6. No lawful standard for denial existed or was applied with respect to such denial.

7. Denial of the drilling permit constituted an unlawful impairment of the lease contract and destruction of its property rights.

LEASING STATE LANDS FOR OIL AND GAS PURPOSES:

Statutory authority for leasing state lands for oil and gas purposes dates back at least to 1909. In that year Act 280 authorized the Public Domain Commission, the predecessor of the Commission of Conservation (now Commission of Natural Resources), to make contracts for the taking of oil and gas from state lands (CL of 1915, § 456). The present statutory authority to lease state lands for oil and gas purposes is found in Section 2 of Act 17, of the Public Acts of 1921, as amended (MCLA 299.2; MSA 13.2). This statute authorizes the Commission to lease state lands for oil and gas purposes as follows:

The said commission is hereby empowered to make contracts with persons, firms, associations and corporations for the taking of coal, oil, gas and other mineral products from any state owned lands, upon a royalty basis or upon such other basis and upon such terms as to said commission shall be deemed just and equitable . . .

Pursuant to such statutory authority, the State of Michigan, through the Department of Conservation, now the Department of Natural Resources, has, for many years, leased state lands for oil and gas purposes. The twenty-fifth biennial report of the Department of Natural Resources for the period 1969/70, in Table 11 on Page 154, sets forth the revenues to the State of

Michigan from oil and gas leases on state-owned lands over a forty-three year period, 1927 to 1970. Exhibit A-33 brings this Table up to July 1, 1972. The State of Michigan received oil and gas revenues of \$7,592,661.00 for the period 1967 to 1971 (Ex: A-32, A-33). No state lease sales were held in 1970 and 1971, but were resumed in 1972 and in that year brought in over \$9,000,000.00 (Wood, T-136, 137).

There has been no change in Lands Division procedure on lease sales since 1968, but the procedure as to leasing with regard to other Divisions has changed. The change was made in 1972 after the adoption of a zoning plan by the Commission. Applications are now referred to the regional manager through the Forestry Division on township plats prepared by the Lands Division, showing zoning rather than lists of descriptions. After the list is prepared, it is sent to the regional manager as before (Wood, T-354, 391, 392).

The zoning map adopted by the Commission makes certain designations. Those areas marked in red are critical; green with red hash marks indicate tracts already leased; straight green, not critical—will be leased without restrictions. The proposed well site designated as Corwith #1-22 is in the critical area. The zoning map indicates what tracts are presently leased and how they should be leased when leases are dropped (Wood, T-361, 366, 368, 369, 373, 377).

Prior to two years ago, the region was only involved in making examination of tracts to be leased, and was not involved in drilling applications. Under that procedure, a list of lands proposed for leasing was sent to the regional manager for a quick review to ascertain if the lands to be leased included a State park or designated State game area or some other specific project. Personnel involved were primarily foresters (Yoder, T-1073-1074). The Commission had directed in 1971 that field people were to be involved in lease examinations; included were to be fish and wildlife biologists. The descriptions to be leased were reviewed in the office with the

wildlife biologist-forester. The regional office and the field had only nine days to review all the lands offered to be leased within the region, which was some 500,000 acres; of that 75,000 acres were in Otsego County. The region made no specific recommendations as to whether the lands should be released or drilled (Yoder, T-1076, 1073, 1092; Wood T-380, 381).

Only inspections of sites were made when there was an indication that there might be some reason for denying a lease, such as the fact that it involved a State park or campground (Yoder, T-1081). The final decision as to whether a lease would or would not be granted was made in Lansing (Yoder, T-1083).

PUBLIC LEASE SALE IN AUGUST OF 1968

Under the direction and with the approval of the Commission, the DNR offered at public auction in August of 1968, oil and gas leases covering various state-owned lands, including the proposed drill site. Robert G. Wood, present Chief of the DNR Lands Division, testified that an average of three such sales per year had taken place over a nineteen year period (Wood, T-32, 33).

Preceding this sale, various investigative steps were taken by DNR personnel and reports submitted in connection therewith (Wood, T-34, 47-49). Wood wrote under date of May 23, 1968, to the Deputy Director of Administration, the Regional Manager of Region II, and the Chiefs of the Engineering Division, the Fish Division, the Forest Fire Division, the Forestry Division, the Game Division, the Geological Survey Division, the Lands Division, the Parks Division, the Recreation Resource Planning Division, and Research Development Division, as follows: (Ex. A-1; Wood, T-35, 47-59):

State-owned lands in the areas designated on the attached list have been requested for offering at our next oil and gas lease sale.

Please review the entire list *and advise of any description within these areas which should not be offered and the reasons therefor. Also, please advise of any descriptions which should be offered with a special restriction for the protection of high use areas and other special conservation interests and values*, and indicate opposite such descriptions the number of the restrictive clause on the attached sheet which you recommended be used. [emphasis added]

Attached was a list of all Sections containing lands to be leased for oil and gas purposes (Wood, T-39). Included was Section 22, the site of the proposed well, and identified as being in the Pigeon River State Forest.

The letter refers to "the number of the restricted clause on the attached sheet". Attached was a sheet headed "Special Lease Restrictions" (Wood, T-39). Four numbered paragraphs were there set forth which either required written approval of the Director of the Department or the specific authorization of both the Director and the Commission for drilling an oil or gas well. None of these "Special Lease Restrictions" were set forth in the oil and gas lease on which the State-Corwith 1-22 is located, nor was any of these paragraphs recommended or suggested for such lease in the various responses to Wood's request for advice (Wood, T-63-75; Ex. A-43).

As a part of the review procedure, Roger M. Rasmussen, Regional Forest Supervisor in Region II, reported on June 5, 1968, to Karl Kidder, Assistant Manager of Region II (Ex. A-5). Region II covered the northern part of the lower peninsula and included the Pigeon River State Forest. Kidder, in turn, under date of June 6, 1968, forwarded the Rasmussen report to Wood, advising as follows (Ex. A-4):

Attached you will find a letter from our Regional Forest Supervisor, Roger Rasmussen, which contains our analysis and recommendations of special consideration we feel should be given to various parcels *before they are offered at the pending oil and gas lease sale*. [emphasis added]

The Rasmussen report advised that (Ex. A-5):

We have reviewed the entire listing and make the following notation . . .

Then followed comments and recommendations as to various counties, including Otsego County. However, there was no recommendation, suggestion or requirement as to Section 22, the section wherein the proposed State-Corwith 1-22 well site is found (Wood, T-64). By way of contrast, Rasmussen did suggest that there be no drilling in the Jordan River area in Antrim County and noted some 22 sections as to which drilling should not be allowed. Rasmussen's report as to these sections stated as follows (Ex. A-5):

All the above are either in or adjacent to the Jordan River Valley. We have objected to highway construction through this area, and the Jordan River Watershed Council has objected to almost any kind of development in the semi-wilderness area. Most of the area rates special attention on our multiple use maps, and we believe we should not allow drilling of any kind in the area.

Following up on his May 23, 1968, request for review, which asked for comments and recommendations by June 6, 1968, Wood wrote on July 11, 1968, to the Regional Manager of Region II, and the Chiefs of the various divisions requesting further review, as follows (Ex. A-2; Ex. A-39; Wood, T-62, 63, 291, 292):

Prior to this date we received your recommendations relative to offering state lands at the captioned sale.

The enclosed copy of the sale list is forwarded in order that you may review all the descriptions being offered. Please advise this office prior to July 26, 1968, whether or not you find that any adjustments should be made in this list. If you wish, your reply may be submitted on the enclosed copy of this memorandum.

At that time, C. Troy Yoder, a thirty-year DNR employee, was Region II Manager, and had been well acquainted with the

Pigeon River State Forest for more than twenty-five years (Yoder, T-1056, 1093, 1094). Yoder responded to Wood's July 11, 1968, request for advice as follows (Ex. A-2; Ex. A-3; Wood, T-63 to 75):

"No adjustments necessary."

Wood's file shows responses from (Ex. A-3 to A-24, Wood; T-63):

C. Troy Yoder, Region II Manager;
Karl Kidder, Assistant Region II Manager;
Roger M. Rasmussen, Regional Forest Supervisor, Region II;
H. C. MacSwain, Chief Engineer;
R. J. Campeau, Forest Fire Supervisor;
Glenn M. Schaap, Forestry Division, Section Head;
T. E. Daw, Forestry Chief;
Cash Wonser, Land Use Specialist, Game Division;
L. M. Cook, Development Planning, Parks Division;
R. H. Helmic, acting in charge, Development Planning Parks Division;
William H. Colbourn, Recreation Resources Planning;
Norman F. Smith, Chief, Recreation Resources Planning;
D. H. Jenkins, Chief, Research and Development;
G. M. Cooper, Fisheries Representative of Research and Development;
L. W. Price, Geologist, for Gerald F. Eddy.

None of these responses suggested or recommended that lands in Section 22 of Corwith Township be withheld from the sale. None suggested or recommended that the lands be leased with special restriction. In this connection, the Pigeon River State Forest at the time these men reviewed the proposed leasing of state lands was well known to DNR personnel (Black, T-1200; Yoder, T-1094, 1451; Johnson, 1769). The Pigeon River Fisheries Research Station, less than two miles to the northwest

of the proposed well site, was formerly the Pigeon River Headquarters (Ex. A-36; Yoder, T-1094). Meetings for DNR personnel were held at the Headquarters through the years. The Black River and Pigeon River, both prominent trout fishing rivers, flow through the forest. A trout research project was then being carried on in Corwith Township as set forth in response of Doctor David Jenkins (Ex. A-21). Within two or three miles from the land under review were found three public campgrounds, the Round Lake Campground, the Pigeon River Bridge Campground, and the Pigeon River State Forest Campground (Ex. A-36). Elk were introduced in the Pigeon River State Forest in 1918 (Moran, T-2148), and were the subject of two well-publicized hunting seasons in 1964 and 1965 (Moran, T-2148). The Pigeon River area was also, at that time, the subject of a five year DNR elk research project which commenced about 1963 (Morgan, T-2125).

Mr. Wood then mapped all lands to be offered for lease at the sale, showing those which were restricted, for review by Deputy Director Gaylord A. Walker, who approved (Ex. A-24, A-25; Wood, T-79-92, 98, 290, 291).

Following this review, the DNR held the lease sale on August 5 through August 9, and on August 12, through August 16, 1968 (Wood, T-98). Bids totalling \$1,122,788.00 were accepted for oil and gas leases covering 546,196.89 acres of state lands (Woods, T-101). Ralph A. MacMullan, then Director, recommended that the sale be approved by the Commission (Ex. A-26; Wood, T-99 to 109). On September 5, 1968 the Commission approved the lease sale (Ex. A-26). Thereafter the Director recommended approval to the State Administrative Board and the sale was approved by the Board on September 17, 1968 (Ex. A-27; Wood, T-102 to 104). Under date of October 1, 1968, State of Michigan Oil and Gas Lease No. 9656 was issued covering land which is the site of the proposed State-Corwith 1-22 (Ex. A-28, A-43; Wood T-107 to 109). This land was among the lands leased at the August, 1968, sale to Pan

American Petroleum Corporation (Ex. A-28; A-43; A-40; Wood, T-109, 292-296).

THE OIL AND GAS LEASE:

Under State of Michigan Oil and Gas Lease No. 9656, the State of Michigan receives a free 1/8th royalty on all oil and gas production (Ex. A-28, A-43). The lease is on the usual State of Michigan form, prepared by the Department (Wood, T-146, 299, 308). The granting clause of the lease reads as follows:

Granting Clause:

"C". Said Lessor for and in consideration of a cash bonus in hand paid . . . has granted, demised, leased and let, and by these presents does grant, demise, lease and let without warranty, express or implied, unto the said Lessee for the sole and only purpose of drilling, boring, mining and operating for oil and gas, and acquiring possession of and selling the same, and for laying pipelines, and building tanks, power stations, and structures thereon, necessary to produce, sale, and take care of such products, all those certain tracts of land . . ." (then follows the descriptions of various lands, including the proposed well site.)

The lease was given for a term of ten years "and as long thereafter as oil and/or gas are produced in paying quantities."

The lease further provides that the lessee is to operate in accordance with the rules and regulations of the DNR (See ¶¶ 7, 9 and H of the lease).

Paragraph G provides that the lessor reserves the right to use the premises leased, "*but not to the detriment of the rights and privileges herein specifically granted.*"

Paragraph H provides as follows:

"H" This lease shall be subject to the rules and regulations of the Department of Conservation now or hereafter in force relative to such leases, all of which rules and regulations are made a part and condition of this lease; *provided,*

that no rules or regulations made after the approval of this lease shall operate to affect the term of lease, rate of royalty rental, or acreage, unless agreed to by both parties. [emphasis added]

By assignment dated December 14, 1968, Pan American Petroleum Corporation, the initial lessee, assigned fifty (50%) percent of such lease to Northern Michigan Exploration Company (Ex. A-29; A-44). Department approval of such assignment was endorsed thereon under date of March 18, 1969, by Gaylord A. Walker, Deputy Director. By assignment dated January 28, 1972, the owners of such lease assigned the same to McClure Oil Company, insofar as such lease covers the South $\frac{1}{2}$ of the Southeast $\frac{1}{4}$ of said Section 22, the site of the State-Corwith 1-22 (Ex. A-30, A-45). Again, Department approval appeared thereon, dated April 3, 1972, and executed by Gaylord A. Walker, Deputy Director. These assignments were approved in accordance with long-standing practice of the Department, a practice which had existed for twenty years, and the rules and regulations pertaining thereto (Wood, T-122, 123, 149, 150, 163, 309-313, 426, 433-436; Ex. P-8; A-46 to A-46).

A farm-out agreement dated May 19, 1972, was entered into between McClure Oil Company, and its wholly-owned subsidiary, Michigan Oil Company (Ex. A-34; Orr, T-177 to 182). Under this farm-out agreement Michigan Oil Company agreed to drill the State-Corwith 1-22 to test the Niagaran formation. Should the well be a commercial producer, McClure Oil Company was required to assign the lease to Michigan Oil Company.

Michigan Oil Company applied to the Supervisor of Wells on May 31, 1972, for permit to drill the well in question (Ex. D-1; D-44; Orr, T-176). At that same time Michigan Oil Company advised the Department of its contract with McClure Oil Company to earn the lease by the drilling of this well, and that an assignment would then be made (Ex. A-38; A-41; Orr, T-286; Wood, T-317, 325). It was a usual Department practice to issue a permit under a farm-out agreement with the applicant to

receive an assignment of the lease following the completion of a well (Wood, T-317, 318; Orr, T-597; Ex. A-47 to A-56).

THE OIL AND GAS WELL:

Michigan Oil Company proposes to drill the State-Corwith 1-22 to an approximate depth of 5,000 feet to produce oil and gas from the Niagaran formation (Orr, T-189, 202). This drill site is approximately $2\frac{1}{2}$ miles north of the State-Charlton 1-4, which was completed in June of 1970, as a commercial producer, also from the Niagaran formation (Ex. A-35; Orr, T-220).

The State of Michigan, owner of the land on which the State-Charlton 1-4 is located, also leased such land at public auction under the usual State of Michigan oil and gas lease.

It is claimed that a successful well can be drilled at the proposed site, which will produce oil and gas in amounts comparable to production from the State-Charlton 1-4. Probable reserves are estimated at from 8 to 20 million barrels of oil (Orr, T-218, 224 to 226, 240, 244, 245, 501). There has been a high ratio of success for wells drilled on seismograph data (Orr, T-527). The State-Charlton 1-4 well is an outstanding well, and under pro-ration is producing 300 barrels of oil and 300,000 cubic feet of gas daily (Orr, T-240 to 243; Roth, T-745). The State of Michigan, owner of the land on which the State-Charlton 1-4 is located, also leased such land at public auction under the usual State of Michigan oil and gas lease. In that area, oil is being purchased for \$3.00 per barrel, and gas for approximately 46 cents per thousand cubic feet (Orr, T-243).

Applicant claims that to make the drilling site accessible, there would be no need for any road changes or alterations. Some ten to twelve trees would have to be cut in the vicinity of the south line of Section 22 in order to get equipment around the curb or corner onto the dirt road running south of Section 22, and some 300 feet of road would have to be built from the

south line of Section 22 to get onto the location (Orr, T-254 to 256).

The drilling crew has twelve men per day on the site, plus a supervisor. They will work in three shifts. In addition, there would be a geologist and mud analysis engineer (Orr, T-259, 260).

Pits to hold drilling fluid would have to be dug. These would be four feet deep; with one series being seventy-five to eighty feet long and twelve feet wide; and another, the reserve pit, would be forty foot square. All pits would be lined to contain the fluids within them (Orr, T-257, 258).

A pump or compressor might be operated at the State-Corwith 1-22 location. Electric power for such units would be secured from a point $2\frac{1}{2}$ miles away, at the State-Charlton well, and would require the laying of a line and clearing of an area for such line (Orr, T-473, 474).

The drilling operation will take three to four weeks, and during that time a drilling rig, consisting of a derrick, draw-works, mud pump, etc., would be on the location; and there would be auto, truck, machinery and equipment traffic during that time.

The well location requires a cleared area approximately 200 feet by 250 feet and is situate approximately $\frac{1}{4}$ of a mile west of Tin Shanty Bridge Road, and about 330 feet north of the Round Lake Road (Ex. D-1, D-44, A-36, Orr, T-254 to 256).

Upon completion as a producer, an additional area of like size will be needed for well equipment. Two tanks and a heater-treater must be installed at the location. Exhibit A-37 shows installations and equipment comparable to those which would be used at the well site. Dikes are to be constructed around the installations as well as around the location, as required by DNR personnel to prevent the escape of any fluid. The well site and equipment will be screened from the road along the south line of

Section 22 by a buffer zone of trees or plantings [sp.] (Orr, T-268 to 279).

The handling of the well location and access to state land is directed and controlled by the Forestry Division of the DNR, and the drilling, completion and operation of the well are governed by the Geological Survey Division of the DNR (Moore, T-1532, 1643; Lawrence, T-1986, 1987, 2025, 2026; Acker, T-2305; Ellis, T-2265, 2266; Orr, T-257, 258, 271, 449, 571).

The well cannot be operated, after completion, until a pipeline is constructed to remove natural gas (Orr, T-284). This is to avoid flaring gas in the open air during producing operations. Consumers Power Company, a public utility in the State of Michigan, will take all gas produced by this well, and will construct a pipeline for the removal thereof (Orr, T-284). Permits for this line must be secured from the Michigan Public Service Commission, and the DNR (Waggoner, T-679, 715). Consumers will construct the pipeline in the road right-of-way following Round Lake Road east to Tin Shanty Bridge Road, then south on Tin Shanty Bridge Road to Lost Cabin Trail, and then to a pipeline at the State-Charlton 1-4 well (Ex. A-57; A-58; Waggoner, T-678 to 690. Where the Black River crosses Tin Shanty Bridge Road, the stream flows through two culverts. Consumers will bore underneath these culverts with the pipeline in order not to disturb the stream (Waggoner, T-683, 684, 711). Construction of the line will take about three to four weeks (Waggoner T-683 to 685, 698).

A gas pipeline would vary in size from six inches to twelve inches, and if not laid in the road would require the clearing of fourteen feet. The Michigan Oil Company claims it is considering two pipelines, a minimum of six inches for gas, and four inches for oil. These would be laid at $2\frac{1}{2}$ foot depth. The size of the oil pipeline could vary to a maximum of sixteen inches (Orr, T-463, 465; Waggoner, T-683, 692).

WELL SITE AND SURROUNDING AREA:

The proposed well site is 12 miles east of Vanderbilt, and 12 miles east and 7 miles north of Gaylord (Ex. A-59). About ninety (90%) percent of the land in Corwith Township is state-owned, and a major portion of the land in Charlton Township adjoining to the south is also state-owned (Ex. A-36; A-109; Manthy, T-874). These state lands are in the Pigeon River State Forest which is one of 15 state forests in the northern half of the lower peninsula (Ex. A-31; Wood, T-129 to 132). Immediately to the north and to the northeast are the Hardwood State Forest and the Black Lake State Forest (Ex. A-115). The Hardwood State Forest in Cheboygan, Mackinaw and Emmett Counties consists of 146,908 acres (Ex. A-31). State-owned lands in Corwith and Charlton Townships total approximately 38,000 acres (Ex. A-36).

County roads border Section 22 on three sides and a trail road is on the fourth (Ex. A-59; A-36). Tin Shanty Bridge Road, running north and south along the east section line, is a primary county road. Maintained throughout the year this road connects to the south with Gibbs Valley Road, a black-top road running from Gaylord. At the northeast corner of the section, Tin Shanty Bridge Road meet Sturgeon Valley Road out of Vanderbilt. Sturgeon Valley Road, running along the north line of Section 22, is also a primary county road. On the southline is Old Round Lake Road running west from Tin Shanty Bridge Road to the Round Lake Campground. The roads on the north and south lines are maintained throughout the year except that they are not plowed during winter time. There are also several trail roads within Section 22, but these are not county roads and are not maintained (Ex. A-36; A-59; A-109; A-110; A-80 to A-95, these being pictures, Manthy, T-869 to 882).

The drill site is on high, sandy land sloping gently towards the Black River just over a mile to the south. Within two or three miles of the well site are the Pigeon River Research Station

(Old Headquarters), Round Lake Campground, and the Pigeon River Bridge and Pigeon River Forest Campgrounds. The State-Charlton 1-4 discovery well is 2½ miles to the south in Charlton Township. Also, near at hand, about one half mile south and just off Tin Shanty Bridge Road, is a snowmobile parking lot. Tyrolean Hills ski area is on the west side of Charlton, and Lakehead Pipeline running from western Canada to Port Huron traverses the west side of both Charlton and Corwith Townships, crossing the Black River. Michigan Consolidated Gas Company's pipeline running south from the Charlton 1-4 also crosses the Black River in the south part of Charlton Township (Ex. A-35, A-36; A-57, A-59, A-60; Manthy, T-895 to 899, 907, 873 to 876; 885; Strong, T-1917 to 1919; Waggoner, T-675 to 677).

The well site is stocked with aspen, birch and maple timber (Ex. A-88 to 90, being pictures; Manthy, T-887 to 889; Johnson, T-1775. The virgin pine was long ago removed, and Section 22 was entirely planted in the 1930's (Manthy, T-906). This section has witnessed numerous, commercial timber harvests (Ex. A-114; Manthy, T-889 to 891). Timber was harvested in 1946 on the 40 acres on which the well site is located and again in 1963. Altogether, from 1944 to 1968, there have been 16 timber harvests in Section 22. Immediately to the south in Section 27 there was clear-cut timber removal in 1967. In Section 23 to the east, timber harvest operations were carried on in 1970. Currently, there is a timber harvest under way in Section 21. Timber harvesting requires chain saw operations, loading vehicles, trucks and men. (Ex. A-114; Manthy, T-889 to 905).

The value of the timber at the well site, on the stump, is \$3.00 per cord. The timber will run 10 cords per acre (Manthy, T-905).

The timber cover at the well site is common to northern Michigan. Some fifty-one (51%) percent of all forest lands in northern Michigan have this type of cover (Manthy, T-889).

In the Pigeon River Area are found deer, bear, bobcat, elk and game birds. The Michigan elk range, which includes Corwith Township, covers approximately 600 square miles of territory, and is bounded on I-75 on the west, M-68 on the north, M-33 on the east, and M-32 on the south (Moran, T-2184). The elk population is between 500 and 1,000 animals (Johnson, T-1821). Bear number from 30 to 50 (Johnson, T-1822). The Pigeon River Area furnishes good habitat for wildlife. However, no unique or special wildlife habitat features are present at the well site, and the habitat is that generally found throughout the Pigeon River country (Manthy, T-908, 917, 921, 835, 936).

The area is the scene of a great deal of activity. Among the activities carried on are:

1. Camping;
2. Snowmobiling;
3. Sight seeing;
4. Deer hunting;
5. Bear hunting;
6. Bobcat hunting;
7. Coyote hunting;
8. Rabbit hunting;
9. Bird hunting;
10. Commercial timber harvests;
11. Training of hunting dogs;
12. Fishing;
13. Mushroom picking;
14. Motorcycle riding;
15. All terrain vehicle cruising;
16. Hiking;
17. Horseback riding;
18. Pigeon River Research Station;
19. Skiing;
20. Private clubs;
21. Pipelines;

22. Cabins;
23. Oil and gas wells;
24. DNR meetings and classes;

(Ex. A-35, A-57, A-114; Moran, T-2147, 2162; Lawrence, T-2077; Johnson, T-1768; Manthy, T-875, 883, 885, 886, 889, 948, 951, 952, 984, 988; Strong, T-1911-1916, 1919, 1944, 1969; Yoder, T-1094).

Snowmobilers use Old Round Lake Road, Tin Shanty Bridge Road, and Sturgeon Valley Road, all bordering Section 22, as well as the trail road on the west side of that Section. Other roads throughout Corwith and Charlton Townships are used for snowmobile activity. There is a snowmobile parking lot in Section 27 off Tin Shanty Bridge Road and another parking lot in Section 21 near Sturgeon Valley Road. At one time this past winter, twenty snowmobiles with forty persons were observed at the Round Lake Campground (Ex. A-59, A-111; Manthy, T-951, 952, 988, 989, 883 to 885).

There are presently five producing oil and gas wells in Charlton Township (Ex. A-35). SINCE THE DENIAL OF THE PERMIT FOR THE PROPOSED WELL ON JULY 21, 1972, THREE DRILLING PERMITS HAVE BEEN ISSUED IN THE AREA BY THE SUPERVISOR OF WELLS. THE FIRST OF THESE PERMITS WAS ISSUED ON NOVEMBER 7, 1972, FOR THE BLACK 1-19 ON PRIVATE LAND IN SECTION 19 OF CORWITH TOWNSHIP. THE SECOND PERMIT WAS ISSUED ON NOVEMBER 15, 1972, FOR THE STATE-CHARLTON 1-28 ON STATE OWNED LAND IN SECTION 28 OF CHARLTON TOWNSHIP. THE THIRD PERMIT WAS FOR THE McCOURT 1-6 ON PRIVATELY OWNED LAND IN SECTION 6 OF CHARLTON TOWNSHIP, ISSUED FEBRUARY 12, 1973, WHILE THE INSTANT HEARING WAS IN PROGRESS. All of these wells, both producing and permitted, and the proposed location of the State-Corwith 1-22, are comparably situated with respect to the Black River and the Black River Swamp.

Packs of dogs are allowed to run bear in the Pigeon River Area from the middle of July to October, and then used to hunt bear during the fall season. Dogs are also permitted to run bobcat from mid-summer through the January and February bobcat season. Unlimited hunting for coyotes is allowed twelve months of the year, but dog packs may not be used during the spring "nesting season". The rifle season for deer runs from mid-November to December, and the bow season for deer begins in October and runs through November and December (Strong, T-1912, 1914, 1920, 1921, 1923, 1926, 1927).

PERMIT PROCEDURE:

Act 61 and the rules and regulations thereunder require a drilling permit before a well may be drilled. Bearing also on the issuance of permits is a policy statement which the Commission adopted on June 11, 1971, setting forth guidelines for the approval or denial of drilling permit applications (Ex. D-11). At the same time the Commission lifted a moratorium on the granting of permits which had been in effect for a number of months at Commission direction. DNR department letter No. 192 followed on August 1, 1971, instructing personnel as to the Commission's policy and outlining the procedure for handling permit applications (Ex. D-12).

The policy statement is not a rule or regulation adopted pursuant to the *Michigan Administrative Procedures Act* (MSA 3.560 (101); MCLA 24.201), and does not, therefore, appear in the *Michigan Administrative Code*.

Paragraph 2b of the statement provides:

b. Each oil and gas drilling permit application shall be judged on its own merits. When it is determined by the Department that the drilling at the location specified in the application will cause *serious* or unnecessary destruction of the surface, soils, animal, fish or aquatic life or unreasonably molest, spoil, or destroy state-owned lands the permit may be denied by the Supervisor of Wells. Such findings shall be fully justified in writing.

The word "serious" is not found in Act 61 nor the rules and regulations adopted thereunder, but has been supplied by the Commission. Paragraph 3a states:

It must be understood that the statute does not contemplate that no damage or destruction will result from operations.

Michigan Oil Company's application, after filing, was sent to Region II, where DNR field people reviewed and reported to C. Troy Yoder, the Regional Manager. Yoder was also Region II Manager at the time of review for the 1968 lease sale. Neither he nor his personnel then made any objection to the leasing of lands in Corwith Township nor suggested any restrictions.

Yoder reported to Lansing by letter dated July 11, 1972, recommending that the permit be denied. The Yoder letter was transmitted by Deputy Director Harris and Walter to Charles T. Black, the Environmental Quality Section, with direction to prepare a letter of denial. Black prepared a denial letter for the Director's signature, which was signed on July 20, 1972. Pursuant to that direction, Slaughter issued the denial letter on July 21, 1972 (Harris, T-1138 to 1147; Black, T-1215; Ex. A-73; A-74).

EFFECT OF PROPOSED WELL:

If the State Corwith 1-22 is drilled, there will be no significant effect as to the soil, surface, fish or aquatic life or property (Black, T-1299, 1327 to 1333, 1355 to 1357; Johnson, T-1778, Manthy, T-916 to 924; Lawrence, T-2099).

This well will not affect in any significant way, deer, birds and small animals (Johnson, T-1824; Strong, T-1897, 1898; Moran, T-2191).

The claim is made, however, that the well would cause serious and unnecessary damage to elk, bear and bobcat. Nels I. Johnson, Regional Wildlife Biologist for Region II, testified as follows (T-1824):

... If there were no elk up there, and if there were no bear or bobcats—just these other animals—from a wildlife point of view we could not claim serious and unnecessary damage.

With regard to elk, bear and bobcat, there is testimony from several DNR witnesses that *any* human activity disturbs these animals, is detrimental to them, whether it be snowmobiling, camping, an oil well, or any other human presence or user. It is not an oil well in particular but human activity of any kind which disturbs them. It is the position of these witnesses that an oil well as a human activity will disturb the elk, bear and bobcat, and that any disturbance is serious and unnecessary damage because of their sensitive nature (Johnson, T-1782; Moran, T-2142, 2144, 2156, 2159, 2160, 2185; Harger, T-2256; Strong, T-1899, 1946, 1947, 1954, 1974, 1975; Lawrence, T-2050).

Although more than two years have now passed since the State-Charlton 1-4 discovery well, neither the DNR nor any DNR witness has yet made a study to determine the effect of an oil well on elk, bear and bobcat. Nor, for that matter, has one even been suggested. Likewise, no witness was able to point to a study on this subject made by anyone. The record is devoid of evidence as to the extent of disturbance by an oil well based on study or factual data (Johnson, T-1806, 1825, 1826; Moran, T-2136-2140, 2189; Harger, T-2248; Lawrence, T-2099; Strong, T-1971; Moore, T-1675, 1697).

At the same time, the testimony shows that elk are still in that area more than two years after the completion of the discovery well, sharing their range not only with oil and gas operations, but also with camping, snowmobiling, hunting, timber harvesting, and many other public and private uses (Yoder Reports dated April 20, 1972, June 14, 1972, November 6, 1972, February 5, 1973 as to the State-Charlton 1-9, State-Charlton 2-4A, State-Charlton 1-28 and the McCourt 1-6, respectively; Exs. D-40, D-36, D-39, and A-116; also Strong Report on State-

Charlton 1-28 on September 11, 1972, Ex. D-39; Moore, T-1676 to 1985).

Michigan Oil Company's application was denied on July 21, 1972. In that same year, and as recently as February of 1973, while testimony was still being taken in this matter, the DNR granted drilling permits for other wells in the same area. The McCourt 1-6, permitted on February 12, 1973, is in the Pigeon River Area, about three miles from the proposed well site.

All of the above mentioned wells are in the Pigeon River Area. All are in the elk range. All are near the Black River. Each brings human presence which, it is claimed, disturbs the elk. The following table shows the comparative positions of the discovery well, the wells for which permits were granted in 1972 and February, 1973, and the proposed well, in relation to the Black River and the Black River Swamp:

Well Name	Permit date	Distance to Black River	Distance to Black River Swamp
A. State-Charlton 1-4 (discovery well)	5/15/70	3,960 feet	200 feet
B. State-Charlton 1-9	4/26/72	5,280 feet	200 feet
C. State-Charlton 2-4a	6/21/72	3,960 feet	200 feet
D. State-Charlton 1-5	7/10/72	3,960 feet	200 feet
E. Black 1-19	11/07/72	800 to 1,000 ft. from Pigeon Riv.	
F. State-Charlton 1-28	11/15/72	2,200 feet	150 feet
G. McCourt 1-6	2/12/73	5,280 feet	500 feet
H. State-Corwith 1-22 (proposed well site)		5,800 feet	550 feet

(Ex. A-35; A-60; A-116; D-33; D-34; D-36; D-37; D-39; D-40; D-41; D-44; Manthly T-873, 898, 913; Yoder, T-1100 to 1103; Slaughter, T-805).

Some DNR witnesses expressed fear as to offset wells which might follow. The testimony, however, was that Michigan Oil Company planned to drill only one well, and that one well could drain the prospective reservoir (Orr, T-471, 472, 477, 478). Moreover, the control over the granting of additional permits, and the spacing and density of well locations, is vested by law in the DNR (Orr, T-477 to 479; Sections 6, 13 and 23 of Act 61 of Public Acts of 1939, above cited; *Michigan Administrative Code*, R299.1101). Additionally, each well is to be judged on its own merits under Commission policy and DNR procedures (Ex. D-11; D-12).

The well must be drilled in a careful and prudent manner by Michigan Oil Company. The location and access will be governed and controlled by the Forestry Division of the DNR. Drilling and producing will be at all times under the supervision and control of the DNR through its Geological Survey Division.

It must be concluded that this well, drilled and operated in a careful and prudent manner, will not cause any serious or unnecessary damage or destruction to the surface, soils, fish or aquatic life or property, nor will it unreasonably spoil or molest state land.

It has not been established that the State-Corwith 1-22 will cause damage to elk, bear or bobcat.

If human presence disturbs elk, such disturbance is already widespread in that area, and no one could testify that an oil well is more disturbing than snowmobiling, hunting, use of dog packs, commercial timber harvesting, and the many other activities now carried on throughout the year.

PERMITS FOR PRIVATE WELLS:

The difficulty in distinguishing Michigan Oil Company's application and the pressing issue which cannot be avoided, to-wit: discrimination and arbitrariness in the Department's denial, is that which is pointed out in the extractions of testimony as set forth in the Attorney General's proposed findings,

on pages 27, 28, and 29 of Findings of Fact and Conclusions of Law submitted by Jerome Maslowski, on behalf of the DNR, and quoted herein follows:

"Applications to drill private wells have been generally considered in a limited sense, the Department being concerned primarily with road access, and personnel felt that they had no authority to review such applications in the same critical manner as those on State land. Private well permit applications considered in that light were J. O. Black 1-19, Song of the Morning Ranch 1-19, Salling Hansen 3-4, Marstrand 1-27, 1-28 P, and Salling Hansen 1-31 (Exhibit 19; Lawrence, T-1933, 2017, 2018).

". . .

"The permit for Alex McCourt 1-6 was granted because the location was on the periphery as opposed to the heart of the Pigeon River Country and because it was on private land and not on public land. If the application had been made for a location on State owned land, it would have been denied because of the biological situation (Gazlay, T-10, 11).

"The location was close to the boundary of the area which has been traditionally and typically identified as the Pigeon River Country which is the area of prime elk management potential (Gazlay, T-12).

"The McCourt site being near the periphery of the area, delineated as prime management potential area for elk and big game, is not as sensitive a location in the terms of the future elk management in the area as the Corwith site (Gazlay, T-18).

"The field people in evaluating the McCourt site were not expected to take into consideration the difference with respect to land ownership (Gazlay, T-18).

"The McCourt No. 1 would cause, or threaten to cause, serious or unnecessary damage to or destruction of the surface, soils, animals, fish, aquatic life or property (Gazlay, T-21, 22).

"The Director of the DNR advised Mr. Slaughter that the well proposed at the McCourt site would threaten to cause serious or unnecessary damage, but approval was recom-

mended because damage could be minimized and controlled by the Supervisor of Wells and because the site was on private land (Gazlay, T-26, 27).

"The Department Policy Statement is not always followed with strict adherence because the issue of whether a permit shall be issued is not that clear, that black and white, and you can get shades of gray and the issue can be 55-45 as to the environmental factors and the ownership of land can be the final determinative factor of whether a permit would be issued (Gazlay, T-27).

"The provisions of the policy as they pertain to private land were inadequate for field guidance and consequently amendments to that policy were offered so as to apply a more stringent test to private lands (Gazlay, T-29, 30).

"A field order has been issued by the Director of the DNR which presently provides that applications for drilling for oil and gas on privately owned land will be treated similarly with those on State land and that such applications now will not only be reviewed by the field geologists but also by the regional manager and his staff, including game and fish biologists, foresters, and ecologists. This is a change because prior to such order, applications on private land were reviewed only by field geologists (Gazlay, T-33).

"The McCourt application was approved under the guidelines of the policy approved by the Commission in 1971 in accordance with recommendations by the Director of the DNR (Gazlay, T-35).

"The McCourt application was approved because it was determined that it would not be necessary to construct any roadways and that they were going to use the county owned roadway to intersect the roads and that the wood trails lead directly to the locations so as to minimize environmental encroachment, and finally, that it would not be necessary to do any widening or reconstructing of any of the existing roads (Gazlay, T-36)."

CONCLUSIONS OF LAW

The Supervisor set forth in his letter to Michigan Oil Company the reasons for denial of the permit. These were the reasons

which Michigan Oil Company was required to meet, and not different reasons advanced by the Intervenor months later. In spite of the Hearing Examiner's limitation, Intervenor advanced new and different issues throughout the hearing. Such issues, however, do not in any way require denial of Michigan Oil Company's permit, and assuming that Intervenor was entitled to raise these issues, they are disposed of in the following numbered paragraphs:

1. Assignment:

Intervenor argues that the assignment (Exhibit A-30; A-45) from Pan American and Northern Michigan to McClure, dated January 28, 1972, was deficient in that there was no approval by the Natural Resources Commission. This Assignment, however, bears approval of the Department of Natural Resources dated April 3, 1972, executed in behalf of the DNR by Gaylord A. Walker, Deputy Director. This Assignment was approved in accordance with long-standing practice of the DNR and the Rules and Regulations of the Department. These rules required approval by the Department, not the Commission. In Paragraph 18 of the Rules and Regulations for oil and gas leases on state lands (Ex. A-46) it is stated:

No assignments of leases, acreage, working interests or overriding royalty interests shall be valid except after written approval of same by the Department of Natural Resources . . .

Not only the practice, but the rules as well make it clear that Assignment approval was handled by the Department rather than the Commission. The Assignment was properly approved and Intervenor's objection is without merit.

2. Farmout Agreement:

Intervenor insists that the farmout agreement (Ex. A-34) dated May 19, 1972, between McClure and Michigan Oil Company, its wholly owned subsidiary, was an Assignment which did not have the approval of the Department and therefore

Michigan Oil Company was not a proper applicant for a drilling permit. While the rules as well as the lease itself require approval of an Assignment of the lease or any part thereof, the farmout agreement is not an Assignment, but an agreement to assign, as is apparent from Paragraph 8 of the farmout agreement. At the time of filing the application to drill, McClure Oil Company moreover, advised the DNR, by letter dated May 31, 1972 (Ex. A-41), that a contract had been entered into with Michigan Oil Company whereby the latter would earn the lease by drilling. There are cases that state that an agreement to assign is not an Assignment. As stated in *Great Lakes Realty v. Turner*, 190 Mich 582 on Page 592:

No assignment of the lease was made. At most, what was done was an agreement to assign when the conditions were such that Mr. Brown had a right to assign.

The syllabus in that case states as follows:

Under the restrictive provisions of a lease prohibiting an assignment until the lessee constructed a building on the premises, a sublease for approximately half the term on condition that the sublessee should construct the building described in the underlying lease, when it should be entitled to an assignment of the lessor's interest, was not an assignment within the meaning of the prohibitive clause, which did not relate to an executory contract for hiring the premises, and there could be no forfeiture unless the tenant transferred his entire estate.

See also *Miller v. Pond*, 214 Mich 186.

The files showed exactly the status of matters between McClure Oil Company and its subsidiary, Michigan Oil Company. There was no assignment, but an agreement to assign and under the agreement Michigan Oil Company was entitled to drill. Permits are granted by the DNR in farmout arrangements of this kind as a matter of long-standing practice. Additionally, no objection was made in this regard in the reasons given for denial of the permit by the Supervisor of Wells. Intervenor's objection must fail.

3. Waiver:

By letter (Ex. D-18) dated October 11, 1971, the Supervisor of Wells denied Michigan Oil Company's predecessors, Pan American (Amoco) and Northern Michigan, a drilling permit at a different location on the same 40 acres were involved. Applicants did not appeal the denial of the permit. Intervenor now claims that Michigan Oil Company's predecessors waived their right to the drilling permit by failure to appeal, their lease being thereby in effect extinguished, and that Michigan Oil Company has no greater rights than its predecessors.

Waiver involves an intentional relinquishment of rights (28 Am Jur 2d 836) There is nothing here to indicate that Pan American or Northern Michigan in any way intended to give up their leasehold estate. Failure to appeal the denial of the drilling permit would not and should not accomplish that result. Pan American and Northern Michigan asserted the validity and viability of the lease by thereafter, on January 28, 1972, assigning the same to McClure Oil Company. That assignment was approved by the Department. Intervenor is really here arguing *res judicata*, but that doctrine does not apply since there was no judicial hearing. The leasehold estate was not extinguished and Michigan Oil Company had a right to apply for a permit.

UNNECESSARY DAMAGE:

Intervenor claims that there was uncontradicted evidence that there would be *unnecessary* damage from the drilling of the proposed well. Testimony of DNR experts was to the effect that there was no concern except as to elk, bear, and bobcat, but as to these animals, the testimony was conjectural.

More than two years following the drilling of State-Charlton 1-4, these animals were in and using the area, sharing their range not only with oil and gas operations, but also with campers, snowmobilers, hunters, timber cutters, and many other users. Dr. Manthy, a professor at Michigan State University, testified

that the proposed well would have no significant effect or cause any unnecessary damage. (T-916 to 926).

Under Section 23 of Act 61, and the rules and regulations pertaining thereto, a well may not be drilled without first securing a drilling permit from the Supervisor of Wells. That Section also provides:

. . . Upon receiving such written application and payment of the fee required, the supervisor shall within 5 days thereafter issue to any one owner or his authorized representative, a permit to drill such well: Provided, however, That no permit to drill a well shall be issued to any owner or his authorized representative who does not comply with the rules, regulations and requirements or orders made and promulgated by the supervisor: And provided further, That no permit shall be issued to any owner or his authorized representative who has not complied with or is in violation of this act, or any of the rules, regulations requirements or orders issued by the supervisor, or the department of conservation.

Section 4 prohibits waste and waste is defined in Section 2 as follows:

'Surface waste', as those words are generally understood in the oil business, and in any event to embrace . . . the unnecessary damage to or destruction of the surface, soils, animal, fish or aquatic life or property from or by oil and gas operation . . .

If Michigan Oil were likely to commit waste by the drilling and operation of the State-Corwith 1-22, the Supervisor would be justified in requiring corrective steps to prevent that occurrence.

What is "unnecessary" damage? Any activity, any user, of whatever kind or nature, requires some change in existing circumstances. Clearly, if a well is to be drilled and operated there must be some modification of the existing circumstances. The statute does not prohibit "damage" but only "unnecessary"

damage. The drilling and operation of an oil well is a recognized, lawful activity. Implicit in this recognition is the fact that this activity will cause change. The well requires clearing of location, drilling machinery, installations and personnel. This is contemplated and understood for the statute permits "necessary" damage, but bars only that damage which is "unnecessary". Drilling and producing operations carried on in a careful and prudent manner and in keeping with applicable rules and regulations cannot be "unnecessary" damage since these activities are required to accomplish the legitimate drilling and producing objective.

The word "unnecessary" is defined in 91 CJS as follows:

At Page 505: A word of everyday usage and common understanding, and defined as meaning not required by the circumstances of the case; that which is not required by the usual circumstances; needless or useless.

The Attorney General's Opinion No. 4718 addressed to the Director of the DNR on the subject of drilling permits, states in reference to "unnecessary" damage as the phrase is used in Section 2 of the Act 61:

It should be further noted that the damage or destruction proscribed is 'unnecessary damage or destruction.' This we take to mean as waste committed by the improvident or negligent conduct of oil and gas operations or waste that may be prevented by appropriate precautions taken at the location.

It has been established by the testimony that Michigan Oil Company will drill the State-Corwith 1-22 in a careful and prudent manner, under the supervision and control of the DNR and in compliance with all applicable rules and regulations.

MOLESTATION AND SPOILATION:

It is stated in the letter denying the permit, that oil and gas operations cannot be conducted at the proposed site without

molesting or spoiling state-owned lands (Ex. A-74; Ex. D-11; MSA 13.4; MCLA 299.3a).

Molestation is defined in 58 CJS at Page 843, as follows:

The act of molesting. It is defined as meaning a *willful* injury inflicted upon one by interference with the use of rights as person or property . . .

Spoilation is defined in 81 CJS at Page 836, as follows:

A word of evil connotations, defined as meaning the act of plundering; robbery, despoilation . . .

Neither of these concepts can be applied here.

For the reasons stated above with respect to waste, the proposed well will not molest or spoil state-owned lands. Petitioner, the Michigan Oil Company, seeks to do only that which the State of Michigan has authorized and empowered. The oil and gas lease, given by the DNR in line with long-standing policy and practice, and approved and sanctioned by both the Commission and the State Administrative Board, grants the right to enter on and use the property to drill for oil and gas. That is not a trespass, nor is it an unlawful act. The lease in paragraph G reserves to the state the right to use the premises leased, but in that same Paragraph it is also stated that the reservations shall not be "to the detriment of the rights and privileges herein specifically granted." Moreover, Michigan Oil Company asks only to drill as others have been permitted to drill on state leases in that same area. Any claim of molestation or spoilation is without foundation.

EQUAL PROTECTION:

The Fourteenth Amendment to the Constitution of the United States guarantees equality of treatment:

Amendment XIV, Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any

law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.*

16 Am Jur 2d, 849, states as follows:

The guiding principle most often stated by the courts is that the constitutional guaranty of equal protection of the laws requires that all persons shall be treated alike under like circumstances and conditions, both in privileges conferred and in the liabilities imposed.

The fair treatment requirement extends to all branches of government. In Am Jur 2d the following appears on Pages 855 and 856:

The general rule is well settled that the provisions of the equal protection clause are not confined to the action of the state through its legislature or through the executive or judicial authority. They relate to and cover all the instrumentalities by which the state acts, and extend to all action of a state denying equal protection of the laws, whatever the agency of the state taking the action or whatever the guise in which it is taken. Whoever, by virtue of a public position under a state government, deprives another of any right protected by that amendment against deprivation by the state, violates the constitutional inhibition, and since he acts in the name of the state and for the state and is clothed with the state's powers, his act is that of the state. Hence, the prohibitions include every person, whether natural or judicial, who is the repository of state power . . .

The principle to be applied is also set forth in 2 Am Jur 2d 26, as follows:

. . . Therefore, administrative agencies must execute the law committed to them fairly and honestly and treat everyone alike according to the standards and rules of action prescribed. Failure in this respect, if it extends beyond the rudimentary requirements of fair play, enters the realm of unreasonable and arbitrary action from which the courts will grant relief . . .

Michigan Oil Company seeks to drill under a state lease covering land in the Pigeon River Area.

Five drilling permits were given by the DNR in 1972 and one thus far in 1973, for wells in that area. There is no significant difference between the locations for which these permits were granted and the State-Corwith 1-22 site.

RECOMMENDATION

The action of the Supervisor of Wells in denying drilling permit for the State-Corwith 1-22 should be vacated by the Commission, and the permit granted. The reasons are as follows:

1. The State of Michigan through the DNR has engaged in the business of leasing state lands for oil and gas purposes for many years.
2. Pursuant to such leasing policy, in August of 1968, land which included the proposed drill site was leased for oil and gas purposes by the DNR, such leasing being approved by the Commission and the State Administrative Board.
3. Michigan Oil Company seeks to drill the proposed well in exercise of the rights granted by the lease contract.
4. The well will not cause waste (unnecessary damage) under Act 61, and the rules and regulations thereunder. Nor will the well constitute molestation or spoliation of state land. The well will be drilled and operated in a careful and prudent manner under the guidance, control and supervision of DNR.
5. The proposed well location does not differ in any significant way from other locations for which the DNR has granted drilling permits in the Pigeon River area.

Respectfully submitted,

/s/ Fredric S. Abood, Hearing Officer
Attorney at Law
117 East Allegan Street
Lansing, Michigan 48933

Dated this 11th day of October, 1973.

SCHEDULE I

MICHIGAN OIL EXHIBITS

- A-1. Inter-office letter dated May 23, 1968 from R. G. Wood, DNR Leasing Supervisor to Regional Managers, Division Chiefs, and others setting forth descriptions to be sold and asking for review and whether lands should or should not be offered, and if offered, whether or not restrictions should be imposed.
- A-2. Follow-up Inter-office letter to A-1, dated July 11, 1968.
- A-3. Response of Region II Manager, Troy Yoder to A-2.
- A-4. Memorandum from Karl Kidder, Region II Assistant Manager.
- A-5. Memorandum from Roger Rasmussen, Region Forest Supervisor, to Karl Kidder, Region II, dated June 5, 1968, as to A-1.
- A-6. Response of the Engineering Division to A-2.
- A-7. Response of the Engineering Division to A-1.
- A-8. Response of Forest Fire Division to A-2.
- A-9. Response of Forest Fire Division to A-1.
- A-10. A-1 with stamp that it was received by Forest Fire Division on May 24, 1968.
- A-11. Response from Schap Forestry Division, A-2.
- A-12. Response from Daw, Forestry Division to A-1.
- A-13. A-1 with stamp to show that the Forestry Division received it.
- A-14. Response of Game Division, Wonzer to A-2.
- A-15. Response of Parks Division, L. M. Cook to A-2.
- A-16. Response of Parks Division, R. J. Wilmick, to A-1.

- A-17. A-1 with stamp showing received by Parks Division.
- A-18. Response of Recreation & Resource Planning, William Colburn to A-2.
- A-19. Response of Recreation & Resource Planning, William H. Colburn, 2-A.
- A-20. Response of Research and Development, to A-2.
- A-21. Response of D. H. Jenkins, Research and Development dated June 4, 1968.
- A-22. A-1 showing receipt of letter.
- A-23. Response of Geologist, L. W. Price for Eddy to A-2.
- A-24. 21 County Maps showing all lands to be leased at 1968 sale indicating those to be restricted.
- A-25. Memo from Stephansky of Land Division recommending sale, July 8, 1968, to Walker and Walker's approval endorsed thereon.
- A-26. Memo from Stephansky to Director and Commission approved by Ralph A. MacMullen, Director as to sale dated August 19, 1968. Approved by Commission September 5, 1968.
- A-27. Agenda for Commission to consider August 1968 sale with letter to Chairman of Conservation Committee of the Administration Board, September 12, 1968.
- A-28. Oil & Gas Lease # 9656, State of Michigan to Pan Am.
 - a. Conservation Department approval, September 5, 1968.
 - b. Administrative Board approval, September 17, 1968.
- A-29. Assignment of Oil & Gas Lease # 9656, from Pan Am to Northern Michigan Exploration, dated December 14, 1968 and approved by Walker of the DNR.

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- A-30. Assignment of Oil & Gas Lease #9656 from Amoco (Pan Am) and Northern Michigan Exploration to McClure, dated January 28, 1972, approved by the Department of Conservation, Walker.
- A-31. 25th Biennial Report of DNR, Page 53, showing the State Forests in Region II.
- A-32. Oil & Gas revenues for state leases from 1927-1931 to 1970, June.
- A-33. Table of Oil & Gas Income to June, 1972.
- A-34. Farm-Out Agreement from McClure Oil to Michigan Oil Company, dated May 19, 1972.
- A-35. Map of oil well locations in the area of the proposed drill site.
- A-36. Department of Conservation map of Otsego County.
- A-37. Photo of Miller Bros. Production Unit to show installations comparable to proposed installations at State-Corwith 1-22.
- A-38. Michigan Oil's letter of May 31, 1972 to DNR advising of McClure farm-out to Michigan Oil.
- A-39. Official Sale Record, August, 1968 sale, Page 186.
- A-40. Approval of Commission and Administrative Board of sale of Lease to Pan-American, Lease #9656, at Page 88 of Sale Record.
- A-41. Michigan Oil's letter to DNR Land Division advising of farm-out for McClure Oil. This is the DNR office copy with received stamp of June 1, 1972.
- A-42. Memo from Acker to "Jane" attached to A-41.
- A-43. Certified copy of record of original lease to Pan Am October 1, 1968.
- A-44. Certified copy of record of Assignment to Northern Michigan Exploration of 50% interest by Pan Am, dated December 14, 1968.

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- A-45. Certified copy of record of Assignment by Pan Am (Amoco) and the Northern Michigan Exploration to McClure, dated January 28, 1972.
- A-46. 1970 Rules and Regulations on Leasing—valid as of December, 1970.
- A-47. Permit from McClure on the State Union No. 1
- A-48. Assignment from Shell to McClure, dated October 30, 1969.
- A-49. Assignment from McClure to Shell on Union No. 1.
- A-50. Assignment from Pan Am to McClure, dated September 29, 1969 on the State Union drill site.
- A-51. Permit on the State Montmorency 1-22, dated November 17, 1971.
- A-52. Assignment from North American Exploration to McClure, dated February 29, 1972, on the State Montmorency 1-22.
- A-53. Permit on the State Forest, dated June 30, 1976.
- A-54. Assignment from North American Exploration to McClure on the State Forest, dated November 17, 1970.
- A-55. Permit on the State Allis, dated June, 1970.
- A-56. North American Exploration Assignment to McClure, dated November 17, 1970, on the State Allis.
- A-57. Consumers pipe line map of all pipe lines in the State of Michigan.
- A-58. Aerial map of the Corwith area showing the proposed pipe line site down Tin Shanty Bridge and Lost Cabin Trail (Consumers Power).
- A-59. Chamber of Commerce road map for Otsego County brought up to date.
- A-60. Topography map showing four well locations, Black 1-19; State Corwith 1-28; and 2 Charlton wells.

- A-61. Diagram of stratigraphic sub-surface beds in Michigan.
- A-62a. Explanation sheet for 11 slides of aerial photos taken by Mr. Orr.
- A-62. Slide picture. Lost Cabin Train on Black River looking east, southeast.
- A-63. Slide picture. Showing Lost Cabin Trail, Black River, looking southeast.
- A-64. Slide picture. Looking north of the site showing the upper one-half of Section 22, the upper center is the site.
- A-65. Slide picture. Looking north and down on the site, shows the road on the south of Section 22, but does not have the Black River.
- A-66. Slide picture. Looking east with Tin Shanty Bridge Road on the north and Round Lake Road in the center.
- A-67. Slide picture. Looking east, showing the northeast corner of Section 22 and the intersection of Tin Shanty Bridge and Vanderbilt Road.
- A-68. Slide picture. Showing the South ½ of 15 and the North of Section 22 with the Tin Shanty Bridge Road crossing the bridge.
- A-69. Slide picture. Looking south of the site near the center, the Black River is in the center top and the Lost Cabin Trail Road is shown as it goes to the west and curves to Gibbs Road. Pinnacle ski area is also shown.
- A-70. Slide picture. Pinnacle ski area.
- A-71. Slide picture. Looking west and down on the site, the Round Lake Road on the south part of Section 22, is on the left.
- A-72. Slide picture. Looking south with the drill site in the center of the picture.

- A-73. Inter-office communication from McMullen to Slaughter, dated July 20, 1972.
- A-74. Denial letter from Slaughter to Michigan Oil dated July 21, 1972.
- A-75. Letter from Michigan to Lands (same as A-38).
- A-76. Drilling permit for Black 1-19, dated November 7, 1972.
- A-77. Drilling permit for State Charlton 1-28, dated November 15, 1972.
- A-78. Drilling permit for State-Charlton 2-4A, dated June 21, 1972.
- A-79. Drilling permit on the State-Charlton 1-5, dated July 10, 1972.
(A-80 to A-107 are pictures taken on May 5, 1972)
- A-80. Intersection of Sturgeon Valley Road and Tin Shanty Bridge Road at NE corner of Section 22.
- A-81. Same as A-80 from South.
- A-82. Same as A-80 one-half mile South.
- A-83. Intersection of Tin Shanty Bridge Road and Round Lake Trail.
- A-84. Round Lake Trail along South line of Section 22, near South quarter corner of Section.
- A-85. Approximately 500 feet East of A-84.
- A-86. Round Lake Trail looking North towards well site.
- A-87. Same generally as A-86.
- A-88. Old logging road looking North toward location.
- A-89. Facing East and showing surveyor setting location stakes.
- A-90. Looking South from location.
- A-91. Standing near Round Lake Trail looking South.
- A-92. Same as A-91.

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- A-93. Tin Shanty Bridge Road looking South near Bridge on Black River.
- A-94. South of Bridge facing North.
- A-95. Same as A-94.
- A-96. to Sequence along Lost Cabin Trail running from State-
- A-106. Charlton 1-4 to pictures with Tin Shanty Bridge Road.
- A-107. Pigeon River Bridge on Sturgeon Valley Road.
(A-108 to A-114 Transparencies for overhead projector)
- A-108. Northeastern part of Otsego County.
- A-109. T 32 N, R 1 W, from County Plat Book.
- A-110. Roads in and about Section 22 on Township Plat.
- A-111. Uses as to Section 22 and vicinity on Township Plat.
- A-112. Elevation located by Dr. Manthy on Township Plat.
- A-113. Topographical map.
- A-114. Timber harvest in Section 22.
- A-115. Pigeon River Map showing parts of Otsego, Cheboygan and Montmorency Counties.
- A-116. McCourt 1-6 drilling permit and attached letters, issued 2/12/73; letter from Yoder to Walker 2/5/73; letter from Gazley to Slaughter, 2/9/73; letter from Slaughter to Miller Brothers, 2/9/73.

DNR EXHIBITS

- D-1. Michigan Oil Company application for permit, submitted May 8, 1972.
- D-2. Michigan Oil Company Environmental Impact Statement.
- D-3. State acreage ownership.
- D-4. Map of State and private ownership.
- D-5. Map of dry holes and producing wells.

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- D-6. Department of Commerce Otsego County as of November, 1971.
- D-7. Map of oil wells in Otsego County.
- D-8. Yoder report—2 pages showing names of DNR personnel.
- D-9. Letter from Yoder to Walker dated 7/11/72—report on State Corwith 1-22.
- D-10. Memo from Harris to Director recommending policy for drilling.
- D-11. Policy which accompanied D-10.
- D-12. Letter No. 182 to DNR personnel instructing as to D-11.
- D-13. Memo from Black to Harris on permit denial 7/20/72.
- D-14. Application of Northern Michigan and Amoco to drill 4/26/71.
- D-15. Letter 7/20/71 from Worley to Slaughter as to D-14.
- D-16. Acker letter dated 7/26/71 to Worley as to steps to be taken.
- D-17. Memo 8/9/71 from Yoder to Walker as to D-14.
- D-18. Letter to Worley from Slaughter denying D-14, dated 10/11/71.
- D-19. Topographic map showing location of wells.
- D-20. Region II file on State—Charlton 2-4 A.
- D-21. Region II file on State—Charlton 1-5.
- D-22. Region II file on State—Charlton 1-9.
- D-23. Not admitted.
- D-24. Region II file on State—Charlton 1-28.
- D-25. Region II file on State—Wellich 1-4.
- D-26. Withdrawn.
- D-27. Region II file on State—Corwith 1-22.
- D-28. Attorney General's Opinion.

- D-29. Not admitted.
- D-30. Not admitted.
- D-31. Department letter No. 182 dated 1/6/70—superseding policy dated 1/1/44.
- D-32. Picture of an elk.
- D-33. Geological survey file on State—Charlton 1-4.
- D-34. Geological survey on file on 2-4.
- D-35. Geological survey file on Marstrand 1-27.
- D-36. Geological survey file on State—Charlton 2-4 A.
- D-37. Geological survey file on Black 1-19.
- D-38. Geological survey file on private land 1-28.
- D-39. Geological survey file on State—Charlton 1-28.
- D-40. Geological survey file on State—Charlton 1-9.
- D-41. Geological survey file on State—Charlton 1-5.
- D-42. Not admitted.
- D-43. Not admitted.
- D-44. Geological survey file on State—Corwith 1-22.

PIGEON RIVER ASSOCIATION EXHIBITS

- P-1. Right of Way from Department of Conservation to the Otsego County Road Commission for the County road on the South of Section 22-321.
- P-2. Minutes of DNR meeting (10/18/65) at (Page 198, Volume 45 of the Biennial Report) authorizing the director and deputy director to lease lands.
- P-3. Proof of Publication for sale by Booth Enterprises with attached publication.
- P-4. Zoning map of DNR for Otsego County.
- P-4A. Slide picture of P-4.
- P-5. Withdrawn.
- P-6. Memo on Oil and Gas Lease Policy, dated 2/1/72, referring to zoning.

- P-7. Departmental letter, No. 182, dated 8/1/72, concerning the issuing of permits.
- P-8. Resolution of Commission allowing the director and deputy director to approve leases and assignments.
- P-9. Chamber of Commerce map of Otsego County.
- P-10. Memo from Lawrence to Rasmussen 6/26/70 as to State—Corwith 1-3.
- P-11. Picture taken from Tin Shanty Road looking west on Round Lake Campground Road.
- P-12. Picture of the gully or intermittent stream west of the well site as it crosses Round Lake Road.
- P-13. Picture taken on Round Lake Campground Road ¼ mile west of its junction with Tin Shanty Bridge Road.
- P-14. Picture of the proposed well site and the general area.
- P-15. Picture of the general area at the well site.
- P-16. Picture of the general area at the well site.
- P-17. Picture of the Michigan Oil stake looking east.
- P-18. Picture of the Michigan Oil stake looking south.
- P-19. Picture of the Michigan Oil stake looking east.
- P-20. Picture of the Michigan Oil site looking west.
- P-21. Picture of Sturgeon Valley Road looking east from its junction with Tin Shanty Bridge Road.
- P-22. Picture of Sturgeon Valley Road looking west from its junction with Tin Shanty Bridge Road.
- P-23. Picture of Sturgeon Valley Road looking west.
- P-24. Junction of Round Lake Road and Sturgeon Valley Road looking east.
- P-25. Picture of Tin Shanty Bridge Road south of its junction with Lost Cabin Train Road.
- P-26. Picture of Tin Shanty Bridge Road south of the Black River Bridge.
- P-27. Picture of Tin Shanty Bridge Road at its intersection with Lost Cabin Trail.

- P-28. Picture of the Black River Bridge on Tin Shanty Bridge Road.
- P-29. Tin Shanty Bridge Road looking north at the Black River Bridge.
- P-30. A house or cabin on Lost Cabin Trail Road.
- P-31. Picture of Lost Cabin Trail.
- P-32. Picture of pipeline right-of-way.
- P-33. Not admitted.
- P-34. Not admitted.
- P-35. Not admitted.
- P-36. Not admitted.
- P-37. Not admitted.
- P-38. Charlton 1-4.
- P-39. Charlton 1-4.
- P-40. Not admitted.
- P-41. Withdrawn.
- P-42. Map.
- P-43. Resolution of Otsego County Road Commission dated December 29, 1972.
- P-44. Release of right-of-way for highway purposes.
- P-45. Insect collection.
- P-46. Insect collection.
- P-47. Insect collection.
- P-48. Picture on January 19, 1973.
- P-49. Picture on January 22, 1973.
- P-50. Clean up of P-48 view.
- P-51. Picture.
- P-52. Picture.
- P-53. Picture.
- P-54. Picture.

SCHEDULE II.

WITNESSES CALLED BY MICHIGAN OIL COMPANY

1. Biek, John R., Gas Procurement and Supply, Consumers Power Company.
2. Manthy, Robert S., Associate Professor of Forestry, Michigan State University.
3. Orr, Vance W., President of Michigan Oil Company.
4. Roth, William K., Geologist, Michigan Oil Company.
5. Slaughter, Arthur E., Chief of the DNR Geological Survey.
6. Waggener, Eugene A., Manager of Gas Production, Transmission and Engineering, Consumers Power Company.
7. Wood, Robert G., Chief of DNR Lands Division.
8. Zimmerman, Walter, Michigan Oil Company.

WITNESS CALLED BY THE DNR

1. Acker, Robert M., DNR Chief of Oil and Gas Section.
2. Black, Charles T., DNR Supervisor of Environmental Quality Section, Research and Development.
3. Ellis, Billie G., DNR Geologist with Geological Survey.
4. Harger, Ellsworth M., DNR Wildlife Research Biologist.
5. Harris, Charles D., DNR Deputy Director.
6. Johnson, Nels I., Jr., DNR Regional Wildlife Biologist for Region II.
7. Lawrence, Jerry L., DNR Area Forester, Pigeon River State Forest.
8. MacGregor, John, DNR Fisheries Biologist.
9. Moore, Donald B., DNR Regional Recreational and Environmental Forester.

10. Moran, Richard G., DNR Research Biologist at Houghton Lake Wildlife Research Station.
11. Strong, Robert G., DNR District Wildlife Biologist for Region II.
12. Yoder, C. Troy, DNR Manager of Region II.

WITNESSES CALLED BY THE PIGEON RIVER

1. Hoobler, Sibley, Ann Arbor, Michigan.
2. Montgomery, Weldon J., DNR Staff Forester.
3. Murdich, Perry H. Jr., Gaylord, Michigan.
4. Myers, Gerald J., Gaylord, Michigan (employed at Pigeon River Research Station).
5. Southworth, George Robert, Working on PhD at University of Michigan.

APPENDIX K

OIL AND GAS OPERATIONS STATE OF MICHIGAN ENVIRONMENTAL IMPACT STATEMENT

Well Identification:

Name of Applicant: Michigan Oil Company

Address: Box 147, Alma, Michigan 48801

Well Name and Number: State-Corwith No. 1-22

Location: SE SW SE, Section 22, T32N, R1W, Corwith Township, Otsego County, Michigan

I. Description of Project:

Michigan Oil Company proposes to drill an exploratory test to an approximate depth of 5,000 feet for the production of oil and gas from the Salina-Niagaran formation. The drill site has been staked on the above described lands owned by the State of Michigan. The drill site is located in the Pigeon River State Forest and is approximately 2½ miles south-east of the old State Forest headquarters located in the Pigeon River. The drill site itself is located on a gentle south slope and the drainage from the area is toward the Black River rather than the Pigeon River. The upland soil is classified as Emmet Sandy loam and the swamp to the south as Carbondale muck and Greenwood peat.

The general terrain in this particular spot is relatively flat and stocked with second growth maple with some white birch and aspen. A small volume of aspen and white birch was cut just south of this area in 1963. There are a few

white pine in the area and a scattering of spruce and hemlock on the upland. The trees on the site are mostly under six inches in diameter.

There are no lakes or streams within one mile of this location. The lands to the south (Approximately $\frac{1}{4}$ mile) are the beginning of the swamp area north of the Black River. There is a natural drainage way located some 150 feet west of the stake. This drainage way has been used as a roadway. Minor erosion of vehicle tracks indicates this drainage way carries water during times of rapid snow melt and during heavy rains. This drainage way cannot be interpreted as an intermittent stream.

It will not be necessary to construct any major roads to get to the location. Approximately 300 feet of road will be required from the south side of the location to drill site itself and could follow the old logging road in the drainage way described above. It would be necessary to clear a space approximately 200 feet by 250 feet for the drill site, and, in the event of production a space of similar size would be required for tankage, separator, etc. The clearing and equipment would be screened from the south by a 200 foot buffer zone of trees left intact. The present road system will be adequate for moving in drilling equipment except at the turn from the Tin Shanty Road to road going west along the south side of the location. Some filling would be required here and cutting of some 10 trees, aspen, maple and balsam up to 10 to 12 inches in diameter. If production is encountered it would be necessary to do some grading and to widen the road in places up to 16 feet along the $\frac{1}{4}$ of a mile from the corner to the location. This widening of the road would necessitate cutting about 30 trees, aspen, maple, hemlock and spruce up to 6 to 12 inches in diameter.

II. Environmental impact assessment:

The drilling and operation of a well on the above site would have a minimal and inconsequential effect on the

ecological systems in the vicinity and limited largely to the 2 or 3 acres of the operation site. This area has been managed by the Department for over 30 years for many uses. There have been habitat improvement operations, timber harvested and roads constructed. It is used by naturalists, sightseers, campers, hikers, fishermen, hunters, motorcyclists and snowmobilers. A snowmobile trail passes within 330 feet of the proposed location.

Wildlife of the area is typical of forest land in Northern Lower Michigan, with deer, bear, bobcat and birds of the forest. It is unique in that elk are found here and it is a part of their range of some 180,000 acres. It would appear that all of the above species seem to survive successfully in any area of many uses. If noise is a measure of disturbance to some animals it may be noted that a highway truck at 50 feet has a decibel rating of 86; a motorcycle 90; a snowmobile 104, and a chain saw 115. Operation of an oil well would be another use, but no necessarily a detriment to wildlife.

It has been said that drilling on this site and transportation of the product "may cause serious and unnecessary destruction of the surface soils, animal, fish, or aquatic life and unreasonably molest, spoil and destroy State-owned lands." By compliance with detailed specifications prepared by the Department of Natural Resources, and with all operations under their supervision, none of this would occur. An oil well on this location can be drilled and operated in such a manner that no drainage or waste would escape to the south toward the swamp along the Black River or elsewhere.

If oil is encountered it will be necessary to truck the oil from the location, at least in the early stages of production. This can be done on the roads as they are presently situated, with the exception of the access road immediately adjacent to the drill site. No doubt it would be necessary to construct a pipe line from the location. This line could run south and then southwest to the State-Charlton area located $3\frac{1}{4}$ miles to the

southwest. The pipe line can be located out of sight of roads on the upland if that is desired. To avoid construction on low land and swamp areas it can be laid under, or immediately adjacent to, the road north of the Tin Shanty Bridge. Here the road goes through a swamp and along the side of a leather leaf bog. A pipe line in the road right of way would not open up an area that would cause a rise in water temperature, nor would it in any way interfere with spring run-off or ground water movement. It would be necessary to cut some trees for the crossing of the Black River near the Tin Shanty Bridge which consists of two large culverts. The Black River can be crossed safely with a double casing and with only a temporary disturbance at the time of laying the pipe. There are now sufficient trails and open areas on high ground to permit a pipe line to be laid with a minimum of grading or cutting of trees to the State-Charlton well where the gas and oil can be piped in conjunction with the production from that well. No trouble should be expected from the river crossing. Lakehead pipeline from Canada, after crossing the Straits of Mackinac, runs through the Pigeon River State Forest and crosses the Pigeon River in Section 25, T32N, R2W. We have also noted the recent crossing of the North Branch of the Au Sable on the State Road in Chester Township, Otsego County, which was handled in a very satisfactory manner under the supervision of the Department of Natural Resources. If production is encountered there will be little or no sound or air pollution. Our casing program will protect all fresh water zones and surface drainage will be adequately controlled by strict compliance with Department of Natural Resources specifications.

There is no urban population or development in the area except for two State Forest campgrounds two miles removed from the well site. The Round Lake campground served 179 groups with 750 individuals in 1971, and the Pigeon River campground 276 groups with 1,240 individuals. In the event the well is non-productive and is abandoned the drill site will be

seeded or planted in accordance with the direction of the Department to best serve the needs of the area.

Most of the items covered so far are tangible. In some instances conclusions may be supported by scientific data, others must be weighed, measured and evaluated by experienced and qualified observers. While an additional operation in a forest recreation area may disturb some, we submit, however, that operation of an oil well would be less disturbing to these people than motorcycles, snowmobiles, chain saws, logging trucks and improvement operations that can make a pole timber stand look like a disaster area. We agree with the Department of Natural Resources that this should be managed forest area with many uses. It is a multiple use area and should be managed to provide the greatest returns to society. We believe there is a place in such a management program for the extraction of oil and gas which are just as much a natural resource as are trees, birds, animals, water and an environment for recreation.

III. Possible Alternatives to the Proposed Well Location.

The test well site is situated on a very prominent seismograph anomaly and is located to the best advantage of that anomaly. We would have no objection to moving this location a few rods distance in any direction at the request of representatives of the Department of Natural Resources.

IV. Any Irreversible and Irretrievable Commitment of Resources;

We do not believe there is any irreversible or irretrievable commitment of resources other than the extraction of the oil and gas beneath the surface in this area. The oil and gas are resources, of course, and are irreplaceable substances of considerable economic value. The land itself may be restored and used as it is today which is primarily for recreation and wildlife habitat. We do not believe our operations will be an unreasonable deterrent to the present and anticipated use of the area.

Possible Benefits:

There seems to be no place in the instructions for completing the Environmental Impact Statements that provides for a statement of any possible benefits that could result from the proposed operation. We believe this should be a consideration along with the evidence to prove the operation will not cause unreasonable damage to the environment. There are many factors to be considered and the economics of the proposed operation is an important one. The site applied for was purchased with Game Protection Fund money for the sum of \$33,544.16. Revenues, such as royalties, go back into that fund for use by the Department of Natural Resources.

It should also be noted there may be considerable economic gain. If the oil and gas production on the proposed site proves to be comparable to that of the State-Charlton well 3½ miles to the south, the royalties paid to the Game Protection Fund could be \$3,000,000 over the life of the well. There will also be a severance tax and a personal property tax paid to the State. The employment provided in the installation and operation of the proposed well is a much-needed item in today's economy. And, there is an ever-increasing demand for oil and gas in everyone's everyday life.

V. Summary:

The proposal by the Michigan Oil Company is to drill an exploratory well to the Niagaran formation, and in the event of production, produce oil and gas from this formation. We believe this can be accomplished without unreasonably deterring or affecting the present use of the land for recreation, wildlife habitat and forestry. We will require no additional roads other than 330 feet from a side road to the site. We will create little increase in human activity as compared to that of hunters, campers, sight-seers, motorcycles and snowmobile operations. The drilling

and producing of oil and gas will not create a reduction of wildlife, as has been proven in many areas of the State. The distraction to animal life caused by our operation will be much less than the uses cited above.

The small area to be cleared should in no way affect the forest environment. It will in no way impair the Department's game or forestry programs. Traffic to and from the well by employees would not unreasonably impair the activities of those who use the area. Truck traffic will be almost eliminated when a pipe line is installed. The pipe line can be laid without unreasonably affecting the scenic aspects of the area or damage to surface or ground water. No damage would be caused in any way to the drainage system in the area and no waste would be allowed to make its way to the swamp to the south of the Black River one mile south of the proposed location.

There are important economic benefits that would be realized from the operation and production of an oil and gas well on this location. It would provide money in the form of royalties to the Department of Natural Resources, in taxes to the State and much-needed employment in the area.

Operation of an oil well can be a compatible use of a natural resource in an area owned by the State of Michigan and managed by the Department of Natural Resources to make the best use of all the natural resources. It is not an irreversible or irretrievable commitment of surface resources. It is a temporary use and when completed will leave no permanent adverse effect on the environment.

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Applicant's Representative

/s/ Vance W. Orr

Comments by Supervisor of Wells or Department of Natural Resources Representative:

Comments by Supervisor Wells or Department of Natural Resources Representative:

June 6, 1972

I have, today, examined the proposed drill site and I concur with the Environmental Impact Statement as submitted by the Applicant's Representative.

This is an approved drilling location with no special construction requirements.

/s/ Billy G. Ellis, Geologist

Geological Survey Division

Authorized Representative

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APPENDIX L

STATE OF MICHIGAN OIL AND GAS LEASE 57-18

No. 9656

"A" THIS AGREEMENT, made and entered into this 1st day of October in the year 1968,

BY AND BETWEEN the DEPARTMENT OF CONSERVATION of the STATE OF MICHIGAN, hereinafter called "Lessor", and PAN AMERICAN PETROLEUM CORPORATION, Fort Worth, Texas, hereinafter called "Lessee".

"B" WITNESSETH, THAT WHEREAS the State of Michigan is the owner of all rights of any oil and gas lying within or under any of the lands described below, and whereas Lessor is vested with the authority to lease any of such lands for the prospecting for, mining and taking away of said oil and gas under provisions of Act 280 of Public Acts of 1909, as amended and Act 17 of Public Acts of 1921, as amended.

"C" Said Lessor for and in consideration of a cash bonus in hand paid, the receipt whereof is hereby confessed and acknowledged, and the signing and delivery of a bond, the amount and sufficiency of which is to be determined by the Lessor, and of the covenants and agreements hereinafter contained on the part of the Lessee to be paid, kept, and performed, has granted, demised, leased, and let, and by these presents does grant, demise, lease, and let, without warranty, express or implied, unto the said Lessee for the sole and only purpose of drilling, boring, mining and operating for oil and gas, and acquiring possession of and selling the same, and for laying pipelines and building tanks, power stations, and structures thereon, necessary to pro-

duce, save, and take care of such products, all those certain tracts of land situated in the County of OTSEGO, State of Michigan, and more particularly described as follows:

Corwith Township

Township 32 North, Range 1 West

	Acres	
	Fee	Mineral
NW¼, subject to highway and power line easements, Section 20	160.00	
SW¼, subject to highway easement, Section 20	160.00	
NW¼, subject to highway easement, Section 21	160.00	
SW¼, subject to highway easement, Section 21	160.00	
NE¼, subject to highway easement, Section 22	160.00	
NW¼, subject to highway easement, Section 22	160.00	
SE¼, subject to highway easement, Section 22	160.00	
NW¼, subject to highway easement, Section 23	160.00	
SW¼, subject to highway easement, Section 23	160.00	
NE¼, subject to highway easement, Section 24	160.00	
NW¼, Section 24	160.00	

containing 1,760.00 acres, it being the intention to convey to the Lessee the oil and gas rights to all of the lands described above subject to the control of the Department of Conservation as described herewith.

(1) It is expressly understood and agreed that the Lessor shall not be liable for any damages resulting from failure of its

title to rights included herein; Provided, however, that in the event the Lessor's title fails as to any or all of the rights in the oil and gas covered by this lease, the Lessor shall refund to the Lessee all bonus, rental or royalty payments made by the Lessee attributable to that part or portion of, or interest in the title which has failed.

"D" It is agreed that this lease shall continue in force for a term of ten years from this date, and as long thereafter as oil and/or gas are produced in paying quantities from said lands by the Lessee; provided, however, if Lessee is engaged in actual drilling operations upon any well or wells on said lands at the expiration of the primary term of this lease, this lease shall remain in force and its terms shall continue as long as drilling operations on such well or wells are prosecuted with reasonable diligence and good faith, and if oil and/or gas be found in paying quantities, this lease shall continue and be in force with like effect as if such well or wells had been completed within the primary term; provided, further, that the Lessor may extend the primary term of this lease upon such terms and conditions as it deems advisable, if in the opinion of the Lessor sufficient exploratory and development work has been conducted by the Lessee on the leased premises or in the vicinity thereof to justify such extension.

"E" The term "gas" as used herein shall be interpreted to include natural gas, casinghead gas, casinghead gasoline, drip gasoline, and natural gasoline extracted from natural gas.

"F" In consideration of the premises the said Lessee covenants and agrees as follows:

(1A) To deliver to the credit of the Lessor herein, free of cost in tank car, or pipe line to which Lessee may connect its well or wells, the equal one-eighth part of all oil produced and saved from the leased premises described herein, or at the option of the Lessor, Lessee shall pay the value thereof in cash at the

prevailing market price of oil of same grade and quality at that time and place.

(2) Should gas and oil be found in any well, the Lessee shall pay to the Lessor for gas produced and sold from any such oil well, as royalty, one-eighth of the value thereof in cash at the prevailing market price in the field where produced. If such gas is used by the Lessee for the production of casinghead gasoline, the royalty shall be one-eighth of the gross proceeds received from the sale of such casinghead gasoline and one-eighth of the gross proceeds received from the sale of gas from which the casinghead gasoline has been extracted; provided further that the Lessor shall receive as royalty one-eighth of the gross proceeds of the sale of drip gasoline and natural gasoline received from the gas produced from leased premises.

(3) Should gas only be found, produced and saved from any well, Lessee agrees to pay to Lessor one-eighth of the amount received at the well, for all gas sold off of said premises described above. Adequate and correct meters for the measurement of gas under this and the preceding paragraph shall be installed and properly maintained at the expense of the Lessee.

(3A) If a commercially producible gas well completed on the leased premises, or on acreage pooled or consolidated with all or a portion of the leased premises into a unit for the drilling or operation of such well, is at any time shut in and no gas therefrom is sold or used for the manufacture of gasoline or other products, subject to the conditions hereinafter recited and to other terms and conditions of this lease, such shut-in well shall be deemed to be a well on the leased premises producing gas in paying quantities and this lease shall continue in force during all of the time or times while such well is so shut in, whether before or after the expiration of the primary term hereof; provided, however, that no shut-in gas well shall operate to extend the primary term of this lease for more than 5 years unless further extended in writing by the lessor prior to the end of

said 5 year period. Lessee shall notify lessor in writing that such gas well has been shut in due to conditions or circumstances which, in lessee's judgment exercised in good faith, are unsatisfactory. Unless the lessor shall within 90 days from receipt of said notice notify the lessee in writing that in its opinion such gas should be marketed, the lessee shall be under no obligation to market the gas. If such notice is given by the lessor, the well will retain its shut-in status pending agreement between the lessee and lessor, and if agreement is not reached within 90 days after issuance of such notice, the same will be submitted to a court of competent jurisdiction for determination whether the gas from said shut-in well should be marketed. Lessee shall at all times use reasonable diligence to market gas capable of being produced from such shut-in well. Lessee shall be obligated to pay or tender to lessor within 45 days after the expiration of such annual period during which such well is so shut in, as royalty, the sum of \$1.00 per acre for each acre of the leased premises located within the established gas unit as of the end of such annual period; provided, that, if gas from such well is sold or used as aforesaid before the end of any such annual period lessee shall not be obligated to pay or tender, for that particular annual period, said sum of money. Such payment shall be deemed a royalty under all provisions of this lease and shall be made or tendered to lessor as above designated.

(4) Lessee shall not enter into any contract for the sale of oil or gas without first securing the approval in writing of the Lessor, and copies of such contract shall be filed with the Lessor.

(5) All payments above specified shall be made on or before the twenty-fifth day of the month for all products sold during the preceding calendar month.

(6) In addition to the royalties herein provided for, Lessee shall pay to Lessor as and for rental during the first five years of the lease, the sum of fifty cents per acre per year beginning with the date of this lease and covering all of the acreage contained in this lease at the beginning of any rental period.

Provided, however, if the Lessee shall not have completed the drilling of a well on the leased premises during the first year of this lease, the rental rate shall increase to one dollar per acre per year commencing with the first anniversary date of the lease. The ultimate completion of a well on the leased premises during the first five years of the lease will thereafter reduce rentals until the beginning of the sixth year of the lease to a rate of fifty cents per acre per year.

If oil and/or gas are being produced in paying quantities from the leased premises prior to the beginning of the sixth year of the lease, the rental as and for the unabated acreage shall remain at fifty cents per acre per year for the life of the lease.

If oil and/or gas are not being produced in paying quantities from the leased premises, or have not been so produced prior to the beginning of the sixth year of the lease, the rental for the sixth and succeeding years shall be one dollar per acre per year.

Each and every well producing oil in paying quantities from said premises described above shall abate the rental on eighty acres of the leased premises which shall include the description on which such well is situated together with adjacent or other additional lands designated by the Lessor. Each and every well producing natural gas in paying quantities shall abate the rental on all state lands situated within the established gas-producing unit.

All rental must be paid annually in advance when the total annual rental is one hundred dollars or less, or may be paid quarterly in advance when the total annual rental exceeds one hundred dollars. At the option of the Lessee all rental may be paid annually in advance.

(7) The Lessee shall carry on all operations and maintain the property at all times in a safe and workmanlike manner, having due regard for the preservation and conservation of property and for the health and safety of employees. The Lessee shall take reasonable steps to prevent and shall remove and

dispose of all accumulations of oil or other materials deemed to be fire hazards from the well locations, tank battery, and from the leased premises. Lessee shall also remove from the property all scrap and abandoned oil field equipment. Unless written permission has been secured from the Lessor, only such equipment as is essential for immediate oil and gas drilling and producing operations shall be permitted on the leased premises.

(8) Lessee may surrender all or any part of the premises herein leased, by giving notice in writing to the Lessor; provided, however, that the Lessee may not escape any obligation of the lease by filing a release. Upon surrender, Lessee shall execute and deliver to the Register of Deeds, in the county wherein the lands are situated, for recording, a proper and sufficient instrument of release of all its rights and interest under this lease, insofar as they apply to the premises surrendered, and shall have said instrument delivered to the Lessor.

(9) Said Lessee shall exercise all reasonable and proper care to prevent waste of any oil, gas or petroleum or gas products produced on said premises, and expressly agrees to operate, case, and seal each well in accordance with the laws of the State, rules and regulations of the Department of Conservation and of the State Insurance Department, in such manner as to effectually and permanently prevent waste, contamination of, injury to surface waters or to any of the oil, gas, brine, fresh water, mineral water, coal, or other mineral or mineral substances contained in the rock strata penetrated, and in case of final abandonment, or of ceasing to operate, further expressly agrees to plug or close each and every well according to the laws of the State, rules and regulations of the Department of Conservation, and of the State Insurance Department, in such manner that all oil, gas, brine, mineral or fresh water shall be effectually and permanently confined in the strata in which each occurs; such casing, sealing, plugging, or closing, shall be subject to the inspection and approval of the Lessor or its authorized representatives.

(10) The Lessee agrees when required by the Lessor, to drill and operate wells to offset wells on adjoining tracts, regardless of whether such adjoining tracts are owned or leased by said Lessee or otherwise, but at such distances from the property lines as good and accepted drilling practice warrants, but in no case shall this distance be less than 200 feet except by permission in writing of the Lessor. In accordance with the terms hereof, it is understood and agreed by the parties hereto, that offset wells shall be commenced within thirty days after the Lessee is notified by the Lessor to do so, and the drilling of such wells shall be prosecuted to completion in good faith. Failure to comply with the requirements of this section shall constitute a substantial violation of the terms of this lease. (See Section 14 of the Oil and Gas Lease Rules and Regulations.)

(11) The Lessor shall have the right to examine the books of the Lessee insofar as they relate to the production and sale of oil, gas, gasoline, or petroleum products derived from the premises herein leased.

(12) The Lessor shall have free access to such property so leased, for the purpose of inspection and examination.

(13) The Lessee shall keep an accurate account of all operations under this lease, including production, sales, prices, and dates of same; and shall report to the Lessor on the twenty-fifth day of each month, the quantity produced by each producing unit in the preceding calendar month, the quantities delivered to pipe line companies, and the quantities otherwise disposed of from the premises herein leased; and no tools, fixtures, machinery or other property of the Lessee shall be removed from said premises, if any royalties, damages, or other payments are due to the Lessor, and all sums due on royalties, damages, or other payments shall be a lien on all implements, tools, movable machinery, and all other chattels used in operating said property, and also upon all of the unsold oil obtained from the land herein leased, as security for the payment of said royalties,

damages, or other payments; such lien may be foreclosed in the same manner as chattel mortgages are foreclosed.

(14) Lessee shall keep an accurate log or record of each well, which record shall show exact location of well in section, township and range, character and thickness and depth of the various rock strata penetrated; the horizons at which oil, gas, water, brine, and other minerals were encountered; amount and nature of each; take and preserve as directed by the Lessor, samples of the churnings or core, and of water, brine, or other minerals encountered, as the case may be, in containers furnished by the Lessor, each sample of churnings or box of core to be numbered and accurately marked as the depth with location of land and number of hole from which sample or core was taken; and deliver such log or record, samples, and core to the Lessor.

(15) Lessee shall have the right to use, free of cost, oil, gas and water produced on said land for all operations thereon actually necessary for the production of oil and natural gas and casinghead gasoline from said land and delivering the same to storage tanks, pipe lines, or loading stations; but not for the operation of refineries except on payment of royalty or royalties as further described in Section F1A and F1B of this lease.

(16) When requested by Lessor, Lessee shall bury pipe lines below plow depth.

(17) No well shall be drilled nearer than 200 feet to any house or building on said premises, nor within 300 feet of any public building, without the written consent of the Lessor.

(18) Lessee shall pay for all damages or losses caused directly or indirectly by operations hereunder, whether to growing crops or buildings, to any person or property, or to other operations, or caused through loss, partially or wholly, of the use of the surface of the land or premises by the owner and/or any person holding under him, of the surface rights, on said land. In case of any disputed damage claim under this section

the same may be submitted for determination to a board of arbitration consisting of three members:—an appointee of the Director of the Department of Conservation, an appointee of the claimant, and an appointee of the Lessee. Said Board shall hear the contentions of the parties and a decision concurred in by two of the members of said Board shall be binding on the parties.

(19) Lessee shall have the right at any time to remove all machinery and fixtures placed on said premises, including the right to draw and remove casing from wells not productive of oil or gas in commercial amounts; provided, however, that said Lessee has complied with and fulfilled the other provisions of the lease as herein provided.

(20) Lessee agrees that all wells drilled under this lease shall be drilled in good faith and shall be drilled at least to a depth where there is a reasonable expectation that oil or gas will be found. Further, that Lessor shall have the right to determine whether or not any drilling done by the Lessee is an adequate test within the intent of this lease. If any drilling done by the Lessee shall, in the opinion of the Lessor, not be considered an adequate test, such failure to test shall be considered a substantial violation of the terms hereof.

(21A) It is expressly understood and agreed that no assignments of this lease, or any portion thereof, including working interests or overriding royalty interests, shall be made except after written approval of the same by the lessor.

(21B) It is expressly understood and agreed that assignments of any portion of the premises herein leased shall be construed as a separate lease agreement and not a part of the original lease. Development on the assigned acreage, after the assignment has been made, shall not affect the rate of rental or term of the lease on the unassigned acreage; and, conversely, development on the unassigned acreage, after the assignment has been made, shall not affect the rate of rental or term of the lease on the assigned acreage.

(21C) If the estate of either party is assigned, the covenants hereof shall extend to their heirs, executors, administrators, successors, or assigns, but no change in the ownership of the land or the assignment of royalties shall be binding on the Lessee until after the Lessee has been furnished with a written transfer or assignment or a copy thereof.

(22) Each and every clause and covenant in this indenture shall extend to the heirs, executors, administrators, successors, and assigns of the parties hereto.

(23) Lessee agrees not to sell in the State of Michigan stock or other securities in any company involving lands included in the lease unless and until such stock or security is approved by the Lessor and the Michigan Corporation and Securities Commission and/or the Michigan Public Service Commission.

(24) If said Lessee shall fail to pay any of the rentals, royalties, or other payments at the time and in the manner herein provided, or shall fail to keep and perform any of the covenants or agreements on his part to be kept and performed, then this lease and agreement shall be forfeited at the option of the Lessor. And the Lessor shall exercise such option by mailing to the Lessee at his last known post office address, by registered mail, return receipt requested, a notice thereof, and the Lessee expressly authorizes the Lessor to file a copy of such notice with the Register of Deeds or at any other office where this lease may be filed or recorded, a copy of the notice of such determination, which shall be of the same force and effect as a release by the Lessee to the Lessor of any and all claims which he has or might have under this lease.

"G" The Lessor reserves the right to all minerals on, in and under said leased premises not herein expressly granted; the right to use or lease said premises, or any part thereof, at any time, for any purpose other than, but not to the detriment of the rights and privileges herein specifically granted; the right to sell or otherwise dispose of said premises, or any part thereof,

subject to the terms and conditions of this lease; all rights and privileges of every and whatsoever kind or nature not herein expressly granted.

"H" This lease shall be subject to the rules and regulations of the Department of Conservation now or hereafter in force relative to such leases, all of which rules and regulations are made a part and condition of this lease; provided, that no rules or regulations made after the approval of this lease shall operate to affect the term of lease, rate of royalty, rental, or acreage, unless agreed to by both parties.

IN WITNESS WHEREOF, The said Lessor, by its Deputy Director has hereunto affixed its name and the seal of the said Department by virtue of a resolution passed by the Department of Conservation on September 5, 1968, and the said Lessee has affixed its name and seal on the day and year first above written.

Witnesses to the
Signature of Deputy
Director:

DEPARTMENT OF
CONSERVATION

/s/ Jane Bower
/s/ Marilyn Hills

/s/ Gaylord A. Walker,
Deputy Director

Witnesses to the
Signature of Lessee:

PAN AMERICAN PETRO-
LEUM CORPORATION

/s/ Elmer C. Knott
/s/ B. G. Caves

/s/ D.B. Mason, Jr.,
Its Attorney-in-Fact

(certification and jurats omitted)

APPENDIX M

Well Activity Through February 22, 1973 in Corwith and
Charlton Townships, Otsego County, Michigan

1. Operator: Shell Oil Co.
Name: State Charlton #1-4
Permit No. 28006
Permit Issued: 5-15-70
Completion Date: 6-28-70
2. Operator: Penzoid
Name: State Corwith #1-3
Permit No. 28103
Permit Issued: 7-13-70
Completion Date: 8-29-70
3. Operator: Shell Oil Co.
Name: Willick-St. Charlton #2-4
Permit No. 28204
Permit Issued: 9-30-70
Completion Date: 11-29-70
4. Operator: Woody's Oil & Gas
Name: A. Williams #1
Permit No. 28576
Permit Issued: 8-26-71
Completion Date: 10-18-71
5. Operator: NADCo.
Name: Song of the Morning #1-19
Permit No. 28656
Permit Issued: 10-13-71
Completion Date: 11-24-71
6. Operator: Wolverine Oil & Gas
Name: Marstrand #1-27
Permit No. 28755
Permit Issued: 1-11-72
Completion Date: 5-1-72
7. Operator: Shell Oil Co.
Name: State Charlton #1-9

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- Permit No. 28850
Permit Issued: 4-26-72
Completion Date: 6-6-72
8. Operator: Woody's Oil & Gas
Name: A. Williams #2-29
Permit No. 28854
Permit Issued: 4-28-72
Completion Date: 8-3-72
 9. Operator: Shell Oil Co.
Name: State Charlton Unit #2-4
Permit No. 28916
Permit Issued: 6-21-72
Completion Date: 8-4-72
 10. Operator: Shell Oil Co.
Name: State Charlton #1-5
Permit No. 28951
Permit Issued: 7-10-72
Completion Date: 11-1-72
 11. Operator: Miller Brothers
Name: Black #1-19
Permit No. 29093
Permit Issued: 11-7-72
Completion Date: 12-3-72
 12. Operator: Shell Oil Co.
Name: Salling-Hanson #3-4
Permit No. 28898
Permit Issued: 6-1-72
Completion Date: 12-16-72
 13. Operator: Shell Oil Co.
Name: Salling-Hanson #1-31
Permit No. 29073
Permit Issued: 10-20-72
Completion Date: 1-9-73
 14. Operator: Shell Oil Co.
Name: Plagens-Valek #1-28
Permit No. 29144
Permit Issued: 12-12-72
Completion Date: 2-16-73

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15. Operator: Miller Brothers
Name: McCourt #1-6
Permit No. 29213
Permit Issued: 2-12-73
Completion Date: 3-12-73
16. Operator: Amoco Production
Name: State Charlton #1-28
Permit No. 29099
Permit Issued: 11-15-72
Completion Date: 4-23-73
17. Operator: Michigan Oil Co.
Name: State Corwith #1-22

Well Activity Through September 27, 1974 in Corwith and Charlton Townships, Otsego County and Vienna and Montmorency Townships, Montmorency County, Mich.

18. Operator: Mid-Atlantic Oil Co.
Name: Andrew Bryce #1
Permit No. 29230
Permit Issued: 2-28-73
Completion Date: 4-9-73
19. Operator: Shell Oil Company
Name: Salling-Hansen #4-4
Permit No. 29271
Permit Issued: 4-6-73
Completion Date: 5-22-73
20. Operator: Shell Oil Company
Name: State Charlton #1-27
Permit No. 29433
Permit Issued: 8-27-73
Completion Date: 10-20-73
21. Operator: Shell Oil Company
Name: State Charlton #2-9
Permit No. 29487
Permit Issued: 9-19-73
Completion Date: 11-12-73

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22. Operator: North American Drlg.
Name: J. Oliver Black-Song of the
Morning Ranch #2-30
Permit No. 29448
Permit Issued: 9-6-73
Completion Date: 11-19-73
23. Operator: Woody's Oil & Gas, Inc.
Name: Jim Papst #1-24
Permit No. 29352
Permit Issued: 6-14-73
Completion Date: 11-19-73
24. Operator: Wolverine Gas & Oil
Name: James Knight-State Vienna et al.
Unit #1-23
Permit No. 29492
Permit Issued: 9-24-73
Completion Date: 12-11-73
25. Operator: Shell Oil Company
Name: Fred Tinsey #2-28
Permit No. 29549-A
Permit Issued: 11-13-73
Completion Date: 12-19-73
26. Operator: Shell Oil Company
Name: Blue Lake Ranch #1-30
Permit No. 29597
Permit Issued: 12-14-73
Completion Date: 2-7-74
27. Operator: Shell Oil Company
Name: State Charlton #1-33
Permit No. 29587
Permit Issued: 12-11-73
Completion Date: 3-5-74
28. Operator: Shell Oil Company
Name: State Charlton #1-25
Permit No. 29559
Permit Issued: 11-21-73
Completion Date: 3-17-74

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29. Operator: Shell Oil Company
Name: State Charlton-McKinley #2-33
Permit No. 29586
Permit Issued: 12-11-73
Completion Date: 3-28-74
30. Operator: Shell Oil Company
Name: Johnson #1-32
Permit No. 29623
Permit Issued: 1-9-74
Completion Date: 4-5-74
31. Operator: Wolverine Gas & Oil
Name: Marstrand #1-34
Permit No. 29792
Permit Issued: 6-14-74
Completion Date: 7-11-74
32. Operator: Shakespeare Oil Co.
Name: Gaylord Fishing Club #1
Permit No. 29837
Permit Issued: 7-11-74
Completion Date: 8-8-74
33. Operator: Shell Oil Company
Name: Blue Lake Ranch #1-7
Permit No. 29872
Permit Issued: 8-6-74
Completion Date: 8-20-74
34. Operator: Shell Oil Company
Name: El Mac Hills Resort #1-7
Permit No. 29746
Permit Issued: 5-8-74
Completion Date: Drilling
35. Operator: Amoco Production Co.
Name: State Charlton "A" #2-28
Permit No. 29956
Permit Issued: 9-27-74
Completion Date: Drilling

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APPENDIX N

STATE OF MICHIGAN

William G. Milliken, Governor

DEPARTMENT OF NATURAL RESOURCES

Stevens T. Mason Building, Box 30028

Lansing, Michigan 48909

Howard A. Tanner, Director

May 8, 1979

Michigan Oil Company
Box 147
Alma, Michigan 48801

Attention: Mr. Michael D. Cameron
Re: State Oil and Gas Lease No. P-9656-A

Gentlemen:

We have completed a review of your request for extension of the State lease identified above. This lease covers the S $\frac{1}{2}$, Section 22, T 32 N, R 1 W, which is the site of the proposed Cor-with 1-22 well located within the boundaries of the Pigeon River Country State Forest.

Since your legal counsel requested the Michigan Supreme Court to order an extension of this particular lease in oral arguments before that body, the Department delayed responding to your request until the court had reached a decision. Now that the Court has decided the legal issues involved, it is evident that they did not feel compelled to order the Department to extend the lease. Further, a majority of the court concurred with the Department's decision to deny the drilling permit for the Cor-with 1-22 site. In view of the Court's decision it would be in-

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appropriate for the Department to extend your lease and, therefore, your request is formally denied and upon receipt of this letter, the lease will be terminated.

Please arrange with the Minerals and Leasing Section of the Lands Division for execution of a release.

Sincerely,

/s/ HOWARD A. TANNER
Howard A. Tanner
Director

cc: McClure Oil Co.
Northern Michigan Exploration Co.
Amoco Production Co.

APPENDIX O

OIL CONSERVATION ACT

P. A. 1939, No. 61, Imd. Eff. May 3

AN ACT to provide for a supervisor of wells; to prescribe his powers and duties; to provide for an advisory board and an appeal board; to prescribe their powers and duties; to provide for the prevention of waste and for the control over certain matters, persons and things relating to the conservation of oil and gas, and for the making and promulgation of rules, regulations and orders relative thereto; to provide for the plugging of wells and for the entry on private property for that purpose; to provide for the enforcement of such rules, regulations and orders and of the provisions of this act, and to provide penalties for the violations thereof; and to provide for the assessment and collection of certain fees. As amended P.A.1951, No. 190, § 1, Eff. Sept. 28.

The People of the State of Michigan enact:

319.1 Declaration of policy; conservation of oil and gas

Sec. 1. It has long been the declared policy of this state to foster conservation of natural resources to the end that our citizens may continue to enjoy the fruits and profits thereof. Failure to adopt such a policy in the pioneer days of the state permitted the unwarranted slaughter and removal of magnificent timber abounding in the state, which resulted in an immeasurable loss and waste. In an effort to replace some of this loss, millions of dollars have been spent in reforestation, which could have been saved had the original timber been removed under proper conditions.

Within the past few years extensive deposits of oil and gas have been discovered which have added greatly to the natural wealth of the state, and if properly conserved can bring added prosperity for many years in the future to our farmers and land owners as well as to those engaged in the exploration and development of this great natural resource. The interests of the people demand that exploitation and waste of oil and gas be prevented so that the history of the loss of timber may not be repeated.

It is accordingly the declared policy of the state to protect the interests of its citizens and land owners from unwarranted waste of gas and oil and foster the development of the industry along the most favorable conditions and with a view to the ultimate recovery of the maximum production of these natural products. To that end this act is to be construed liberally in order that effect may be given to sound policies of conservation and the prevention of waste and exploitation.

319.2 Definitions

Sec. 2. Unless the context requires a different meaning, the words defined in this section shall have the following meaning when found in this act, to-wit:

(a) "Person" means any natural person, corporation, association, partnership, receiver, trustee, so-called common law or statutory trust, guardian, executor, administrator and a fiduciary of any kind.

(b) "Oil" means natural crude oil or petroleum and other hydro carbons, regardless of gravity, which are produced at the well in liquid form by ordinary production methods and which are not the result of condensation of gas after it leaves the underground reservoir.

(c) "Gas" means casing-head gas, or gas produced incidental to the production of oil.

(d) "Pool" means an underground reservoir containing a common accumulation of oil or gas or both. Each productive

zone of a general structure which is completely separated from any other zone in the structure, or for the purposes of this act may be so declared by the supervisor of wells, is covered by the word "pool" as used herein.

(e) "Field" means the general area which is underlain or appears to be underlain by at least 1 pool; and "field" also includes the underground reservoir or reservoirs containing such oil or gas, or both. The words "field" and "pool" mean the same thing when only one underground reservoir is involved; however, "field," unlike "pool," may relate to 2 or more pools.

(f) "Product" means any commodity or thing made or manufactured from oil or gas, and all derivatives of oil or gas, including refined crude oil, crude tops, topped crude, processed crude petroleum, residue from crude petroleum, cracking stock, uncracked fuel oil, fuel oil, treated crude oil, residuum, gas oil, naphtha, distillate, gasoline, casing-head gasoline, natural gas gasoline, kerosene, benzine, wash oil, waste oil, lubricating oil, and blends or mixtures of oil or gas or any derivatives thereof whether enumerated or not.

(g) "Owner" means the person who has the right to drill into and produce from any pool, and to appropriate the production either for himself or for himself and another or others.

(h) "Producer" means the operator, whether owner or not, of a well or wells capable of producing oil or gas or both in paying quantities.

(i) "Commission" means the commission of conservation for the state of Michigan.

(j) "Supervisor" means the supervisor of wells as provided by this act.

(k) "Board" means the advisory board appointed, as provided in this act, by the state geologist.

(l) As used in this act, the term "waste" in addition to its ordinary meaning shall include:

(1) "Underground waste" as those words are generally understood in the oil business, and in any event to embrace (1) the inefficient, excessive, or improper use or dissipation of the reservoir energy, including gas energy and water drive, of any pool, and the locating, spacing, drilling, equipping, operating, or producing of any well or wells in a manner to reduce or tend to reduce the total quantity of oil or casing-head gas ultimately recoverable from any pool, and (2) unreasonable damage to underground fresh or mineral waters, natural brines, or other mineral deposits from operations for the discovery, development, and production and handling of oil or casing-head gas.

(2) "Surface waste," as those words are generally understood in the oil business, and in any event to embrace (1) the unnecessary or excessive surface loss or destruction without beneficial use, however caused, of casing-head gas, oil, or other product thereof, but including the loss or destruction, without beneficial use, resulting from evaporation, seepage, leakage or fire, especially such loss or destruction incident to or resulting from the manner of spacing, equipping, operating, or producing well or wells, or incident to or resulting from inefficient storage or handling of oil, (2) the unnecessary damage to or destruction of the surface, soils, animal, fish or aquatic life or property from or by oil and gas operations; and (3) the drilling of unnecessary wells.

(3) "Market waste," which shall embrace the production of oil in any field or pool in excess of the market demand as defined herein.

(m) The words "market demand" as used herein shall be construed to mean the actual demand for oil from any particular pool or field for current requirements for current consumption and use within or outside the state, together with the demand for such amounts as are necessary for building up or maintaining reasonable storage reserves of oil or the products thereof, or both such oil and products and shall not be less than the actual purchasing commitments for oil from such pool or field.

(n) "Illegal oil" shall mean oil which has been produced within the state from any well or wells in excess of the amount allowed by any valid rule, regulation or order of the supervisor as distinguished from oil produced in the state not in excess of the amount so allowed, which is "legal oil."

(o) "Illegal product" shall mean any product of oil or gas or any part of which was processed or derived in whole or part knowingly from illegal oil as distinguished from "legal product" which is a product processed or derived to no extent from illegal oil.

(p) "Illegal conveyance" shall mean any conveyance by or through which illegal oil or illegal oil products are being transported.

(q) "Illegal container" shall mean any receptacle which contains illegal oil or illegal oil products.

(r) "Tender" shall mean a permit or certificate of clearance for the transportation of oil or products, approved and issued or registered under the authority of the supervisor. As amended P.A.1966, No. 262, § 1, Imd. Eff. July 12.

319.3 Supervisor of wells; assistants; advisory board, conservation commission to act as appeal board; salaries, expenses; offices

Sec. 3. The state geologist shall act as the supervisor of wells. He shall designate with the approval of the commission such suitable assistants as may be required to carry out the provisions of this act, and after conference with and recommendations by oil or gas producers or operators or their representatives, shall, subject to approval by the director of the department and by the commission, appoint 6 persons who shall constitute a board to be known as the advisory board. The members of the board shall be chosen from oil or gas producers or operators, or their managing agents or representatives, having ownership, production, or operations within the state of Michigan: Provided, how-

ever, That not less than 3 members of the board shall be independent oil or gas producers or operators whose ownership, production or operations are chiefly within the state of Michigan. There will be not more than 1 representative from 1 company or any of its subsidiaries or affiliates.

The members of the advisory board shall be selected with special reference to their training, experience and standing as oil or gas producers or operators, or as managing agents or representatives of such, and each member of said board shall have at least 5 years of practical or technical experience as a producer or operator himself or as managing agent or representative of oil producers or operators and they shall be residents of the state at the time of their appointment and throughout the period of their membership on the board.

The term of each member of the advisory board shall be for 3 years. Of the first 6 members selected, 2 shall serve for 1 year, 2 for 2 years, and 2 for 3 years. The supervisor, after conference with and recommendations by oil and gas producers, and operators or their managing agents or representatives, shall fill any vacancy occurring in the membership of the advisory board subject to the approval of the director and the commission, and may remove any member thereof for good cause, except for political reasons or causes, after a full public hearing and approval by the commission. Each member of the board, unless removed in the manner herein provided, shall serve until the appointment and qualification of his successor.

Each member of the board shall qualify by taking and subscribing to the constitutional oath of office and by filing same in the office of the secretary of state. The board, after having qualified, shall immediately, and annually thereafter, meet at the office of the supervisor of wells in Lansing and organize by electing a chairman and a vice-chairman. Four members of the board shall constitute a quorum for the transaction of business. The board shall hold at least 1 meeting each month, and such other meetings as it may deem necessary upon such notice as

the board shall provide unless such notice is waived by each member. Meetings shall be held at the office of the supervisor of wells at Lansing, or at such other place in the state of Michigan as may be fixed by the board or the supervisor. Meetings shall be called by the chairman or in his absence by the vice-chairman, or by a majority of the members of the board or by the supervisor.

In addition to the powers and duties of the board which are herein specifically stated, it shall, when requested by the commission or the supervisor, consult and advise with the commission or the supervisor, and shall perform such other duties as may be lawfully delegated to it by the supervisor in the administration of this act. The board shall have the right to participate officially in all public hearings provided for in this act, and also the right upon request being made by the board to consult promptly with the supervisor with respect to the rule, regulation or order, which should be made in view of such hearing.

The board shall, at all reasonable times, have access to all office records, documents, orders, etc., of the supervisor excepting such records as are hereinafter provided in section 6(d)¹ and 23(a)² and shall be kept informed by bulletins or otherwise agreed plan as to the conduct of the supervisor relative to the enforcement of this act.

The commission of conservation shall act as an appeal board. Whenever the advisory board or any producer or owner deems any rule, regulation, order, action, inaction, or procedure as proposed, initiated or made by the supervisor to be unduly burdensome, inequitable, unreasonable, or unwarranted, said board, producer, or owner may appeal to the appeal board for relief from such rule, regulation, order, action, inaction, or procedure, giving due notice to the supervisor. The chairman of the commission shall set a date and place to hear such appeal,

1. Section 319.6.

2. Section 319.23.

which may be at any regular meeting or at any special meeting of the commission duly called for such purpose. The supervisor, members of the board, or any person interested in the matter shall have the right to be heard at such hearing.

The action of the appeal board shall be final with respect to an appeal by the advisory board, but any person may seek relief in the courts as provided elsewhere in this act, and the taking of an appeal as herein provided shall not be a prerequisite to seeking relief in the courts, anything herein to the contrary notwithstanding.

The supervisor and employees shall, in addition to their salaries, receive their reasonable expenses while away from their respective homes traveling upon business connected with their duties. The members of the board and of the appeal board shall receive no compensation, but each member shall be entitled to reasonable expenses while traveling in the performance of any of the duties hereby imposed. All salaries and expenses authorized hereunder shall be paid out of the state treasury in the same manner as the salaries and expenses of other officers and employees of the conservation department are paid.

It shall be the duty of the board of state auditors to furnish suitable offices for the use of the supervisor, the board, and the employees. As amended P. A. 1966, No. 262, § 1, Imd. Eff. July 12.

319.4 Waste prohibited

Sec. 4. It shall be unlawful for any person to commit waste in the exploration for or in the development, production, or handling or use of oil or gas; or in the handling of any product thereof.

319.5 Supervisor of wells; jurisdiction, authority, enforcement of act

Sec. 5. The supervisor shall have, and he is hereby given (a) jurisdiction and authority over the administration and enforce-

ment of the provisions of this act and all matters relating to the prevention of waste as defined herein, and to the conservation of oil and gas in this state; and (b) jurisdiction and control of and over all persons and things necessary or proper to enforce effectively the provisions of this act and all matters relating to the prevention of waste and the conservation of oil and gas.

319.6 Same; rules and regulations; prevention of waste; regulation of drilling; bonds

Sec. 6. The supervisor is hereby empowered, and it is his duty to prevent the waste prohibited by this act. To that end, acting directly or through his authorized representatives, the supervisor, after consulting with the board, is specifically empowered (a) to make and enforce rules and regulations subject to the approval of the commission, issue orders and instructions necessary to enforce such rules and regulations, and to do whatever may be necessary with respect to the subject matter stated herein to carry out the purposes of this act, whether or not indicated, specified, or enumerated in this or any other section hereof; (b) to collect data to make inspections, studies, and investigations, to examine such properties, leases, papers, books and records as are necessary to the purposes of this act; to examine, check, and test and gauge oil and gas wells and tanks, plants, refineries, and all means and modes of transportation and equipment, to hold hearings, to provide for the keeping of records and making of reports, and for the checking of the accuracy thereof; and (c) to require the locating, drilling, deepening, redrilling or reopening, casing, sealing, operating, and plugging of wells drilled for oil and gas or for geological information or as key wells in secondary recovery projects, or wells for the disposal of salt water, brine, or other oil field wastes, to be done in such manner and by such means as to prevent the escape of oil or gas out of 1 stratum into another, or of water or brines into oil or gas strata; to prevent damage to or destruction of fresh water supplies and valuable brines by oil, gas, or other waters, to prevent the escape

of oil, gas, or water into workable coal or other mineral deposits; to require the disposal of salt water and brines and oily wastes produced incidental to oil and gas operations, in such manner and by such methods and means that no unnecessary damage or danger to or destruction of surface or underground resources, to neighboring properties or rights, or to life, shall result: Provided, however, That any such well may be plugged to a fresh water level and not to the surface in case such well is desired to be used as a water well.

(d) To require reports and maps showing locations of all oil and gas wells, the keeping and filing of logs, well samples, and drilling and operating records or reports: Provided, however, All well data and samples furnished the supervisor shall, upon request of owner of well, be held confidential for 90 days after the completion of a well and not open to public inspection except by written consent of the owner: Provided further, however, That no producer shall be required to submit or file logs or reports of core or test wells drilled for geological purposes only, nor required to furnish well samples of such core or test wells.

(e) To prevent the drowning by water of any stratum or part thereof capable of producing oil or gas, or both oil and gas, in paying quantities, and to prevent the premature and irregular encroachment of water, or any other kind of water encroachment, which reduces, or tends to reduce the total ultimate recovery of oil or gas, or both such oil or gas, from any pool.

(f) To prevent fires or explosions.

(g) To prevent "blow-outs," "seepage," and "caving" in the sense that the conditions indicated by such terms are generally understood in the oil business.

(h) To regulate the "shooting" and chemical treatment of wells.

(i) To regulate the secondary recovery methods of oil and gas, including the pulling or creating a vacuum, the introduction

of gas, air, water, and other substances into the producing formations.

(j) To fix the spacing of wells.

(k) To require the operation of wells with efficient gas-oil ratios and to fix such ratios.

(l) To require by written notice immediate suspension of any operation or practice and the prompt correction of any condition found to exist which is causing or resulting or threatening to cause or result in waste.

(m) To require either generally, or in, or from, particular areas, certificates of clearance or tenders in connection with the transportation of oil, gas, or any product thereof.

(n) To identify the ownership of oil and gas producing leases, properties, and wells.

(o) To make rules, regulations, or orders for the classification of wells as oil wells or dry natural gas wells; or wells drilled, or to be drilled, for geological information, or as key wells for secondary recovery projects, or wells for the disposal of salt water, brine, or other oil field wastes, or wells for the storage of dry natural gas or casing-head gas, or wells for the development of reservoirs for the storage of liquid petroleum gas.

(p) To require surety bonds of owners, producers, operators, or their authorized representatives in such reasonable form, condition, term, and amount as will insure compliance with this act and with the rules, regulations, or orders issued thereunder. As amended P. A. 1961, No. 131, § 1, Eff. Sept. 8.

319.7 Prevention of waste; procedure; hearing by board; supervisor to promulgate rules and regulations

Sec. 7. Upon the initiative of the supervisor or the board, or upon verified complaint of any person interested in the subject matter alleging that waste is taking place or is reasonably imminent, the supervisor shall call a hearing, or direct the board to call a hearing, to determine whether or not waste is taking

place or is reasonably imminent, and what action should be taken to prevent such waste. Whenever the supervisor so directs, the board shall hold a hearing and shall promptly make its findings and recommendations, and the supervisor shall promptly consider the same, promulgating such rules, regulations, or orders as he may deem necessary to prevent waste as defined herein, which he finds to exist or to be reasonably imminent.

319.8 Procedure upon hearings; supervisor to prescribe; filing of rules and orders of supervisor; certified copy in evidence

Sec. 8. The supervisor, after consulting with the board and considering its recommendations, shall prescribe rules of order or procedure in hearings or other proceedings before him or the board under this act. Any notice required to be given under this act or under any rule, regulation or order issued by the supervisor, shall be by personal service on the person affected, or by such general notice as the supervisor may fix. All rules, regulations and orders made by the supervisor shall be entered in full in a book to be kept for such purpose by the supervisor. A copy of any such rule, regulation or order, certified by the supervisor, shall be received in evidence in all courts of the state with the same effect as the original.

319.9 Same; witnesses and production of books; incriminating testimony

Sec. 9. The supervisor may, and is hereby authorized, to compel by subpoena, the attendance of witnesses, the production of books, papers, records, or articles necessary in any proceeding before him, the board, or the commission. No person shall be excused from obeying the command of any subpoena issued in any hearing or proceeding brought under the authority of this act on the ground or for the reason that the testimony or evidence, documentary or otherwise, may tend to incriminate

him or subject him to a penalty or forfeiture: Provided, That nothing herein contained shall be construed as requiring any person to produce books, papers or records or to testify in response to any inquiry not pertinent to some question lawfully before such board or supervisor or commission or court for determination within the purposes of this act: Provided further, That any incriminating evidence, documentary or otherwise, shall not thereafter be used against such witness in a prosecution or action for forfeiture: Provided further, That no person testifying shall be exempted from prosecution and punishment for perjury in so testifying.

319.10 Witness; refusal to appear or testify; attachment, punishment for contempt, procedure; witness fees, payment

Sec. 10. In case of failure or refusal on the part of any person to comply with any subpoena issued by the supervisor, or on the refusal of any witness to testify or answer as to any matters regarding which he may be lawfully interrogated, any circuit court in this state, or any judge thereof, on application of said supervisor, may issue an attachment for such person and compel him to comply with such subpoena and to attend before the board or supervisor and produce such documents, and give his testimony upon such matters, as may be lawfully required and such court or judge shall have the power to punish for contempt as in case of disobedience of a like subpoena issued by or from such court, or a refusal to testify therein.

Any witness summoned by subpoena or by written request of the supervisor and attending any hearing called by the supervisor shall be entitled to the same fees and mileage as are or may be provided by law for attending the circuit court in any civil matter or proceeding. The fees and mileage of witnesses subpoenaed at the instance of the supervisor or the board shall be paid out of the general funds of the state treasury upon proper voucher approved by the supervisor. The fees and mileage of

witnesses subpoenaed at the instance of any other interested parties shall be paid by such other parties.

319.11 Perjury, false swearing deemed

Sec. 11. If any person of whom oath shall be required under the provisions of this act, or by any rule, regulation or order of the supervisor, shall wilfully swear falsely in regard to any matter or thing respecting which such oath is required, or shall wilfully make any false affidavit required or authorized by the provisions of this act, or by any rule, regulation or order of the supervisors, such person shall be deemed guilty of perjury and shall be punished by imprisonment in the state penitentiary for not more than 5 years nor less than 6 months.

319.12 Apportionment of allowable production between wells; basis

Sec. 12. Whenever to prevent waste, as defined herein, the supervisor limits the amount of oil to be produced from any pool or field in this state, he shall, after consulting with the board and considering its recommendations, allocate or distribute the allowable production in any such field or pool. Such determination or distribution in such field or pool shall be made on a reasonable basis, giving, if reasonable, under all circumstances, to each small well of settled production in such pool or field, an allowable production which will prevent a general or premature abandonment of wells in such pools or field.

319.13 Same; apportionment of allowable production, basis

Sec. 13. Whenever, to prevent waste, the total allowable production for any field or pool in the state is fixed in an amount less than that which the field or pool could produce if no restriction were imposed, the supervisor, after consulting with the board and considering its recommendations, shall prorate or distribute on a reasonable basis the allowable production among the producing wells in the field or pool, so as to prevent or

minimize reasonably avoidable drainage from each developed area which is not equalized by counter drainage. The rules, regulations, or orders of the supervisor shall, so far as it is practicable to do so, afford the owner of each property in a pool the opportunity to produce his just and equitable share of the oil and gas in the pool, being an amount, so far as can be practicably determined and obtained without waste, and without reducing the bottom hole pressure materially below the average for the pool, substantially in the proportion that the quantity of the recoverable oil and gas under such property bears to the total recoverable oil and gas in the pool, and for this purpose to use his just and equitable share of the reservoir energy: Provided, That a well in a pool producing from an average depth of 1,000 feet or less, shall, on the basis of a full drilling unit as may be established under this section, be given a base allowable production of at least 100 barrels of oil per well per week; for a well in a pool producing from an average depth greater than 1,000 feet, the base allowable production shall be increased 10 barrels per well per week for each addition 100 feet of depth greater than 1,000 feet: Provided further, That such allowable production is or can be made without surface or underground waste, as defined herein.

Drilling unit. To prevent the drilling of unnecessary wells the supervisor, after conference with and recommendation by the board, may fix a drilling unit for each pool. A drilling unit, as contemplated herein, means the maximum area which may be efficiently and economically drained by one well and such unit shall constitute a developed area as long as a well is located thereon which is capable of producing the economically recoverable oil thereunder. Each well permitted to be drilled upon any drilling unit shall be located in the approximate center thereof, or at such other location thereon as may be necessary to conform to a uniform well spacing pattern as adopted and promulgated by the supervisor after due notice and public hearing, as provided in this act.

Unnecessary wells. The drilling of unnecessary wells is hereby declared waste as such wells create fire and other hazards conducive to waste, and unnecessarily increase the production cost of oil and gas to the operator, and thus also unnecessarily increase the cost of the products to the ultimate consumer.

Pooling of properties; drilling on smaller parcels. The pooling of properties or parts thereof shall be permitted, and, if not agreed upon, the supervisor after conference with and recommendations by the board, may require such pooling in any case when and to the extent that the smallness or shape of a separately owned tract or tracts would, under the enforcement of a uniform spacing plan or proration or drilling unit, otherwise deprive or tend to deprive the owner of such tract of the opportunity to recover or receive his just and equitable share of the oil and gas and gas energy in the pool: Provided, That the owner of any tract that is smaller than the drilling unit established for the field, shall not be deprived of the right to drill on and produce from such tract, if same can be done without waste, but in such case, the allowable production therefrom as compared with the allowable production if such tract were a full unit, shall be in the ratio of the area of such tract to the area of a full unit, except as a smaller ratio may be required to maintain average bottom hole pressures in the pool, to reduce the production of salt water, or to reduce an excessive gas-oil ratio. All orders requiring such pooling shall be upon terms and conditions that are just and reasonable, and will afford to the owner of each tract in the pooling plan the opportunity to recover or receive his just and equitable share of the oil and gas and gas energy in the pool as above provided, and without unnecessary expense, and will prevent or minimize reasonably avoidable drainage from each developed tract which is not equalized by counter drainage. The portion of the production allocated to the owner of each tract included in a drilling unit formed by voluntary agreement or by a pooling order shall,

when produced, be considered as if it had been produced from such tract by a well drilled thereon.

Location of unit well. Each well permitted to be drilled upon any drilling unit or tract shall be drilled at a location which conforms to the uniform well spacing pattern with such exception as may be reasonably necessary where it is shown, after notice and upon hearing and the supervisor finds that the unit is partly outside the pool, or for some other reason, a well as such location would be unproductive, or that the owner or owners of a tract or tracts covering that part of the drilling unit or tract on which said well would be located if it conformed to the uniform well spacing pattern refuses to permit drilling at the regular location, or where topographical or other conditions are such as to make drilling at the regular location unduly burdensome or imminently threatening to water or other natural resources, or property or life.

Exceptions. Whenever any exception is granted the supervisor shall take such action as will offset any advantage which the person securing the exception may have over other producers in the pool by reason of the drilling of the well as an exception, and so that drainage from the developed areas to the tract with respect to the exception granted will be prevented or minimized and the producer of the well drilled as an exception will be allowed to produce no more than his just and equitable share of the oil and gas in the pool as such share is set forth herein, and to that end the rules, regulations and orders of the supervisor shall be such as will prevent or minimize reasonably avoidable drainage from each developed area which is not equalized by counter drainage and will give to each producer the opportunity to use his just and equitable share of the reservoir energy.

Minimum allowable production. Minimum allowable for some wells may be advisable from time to time, especially with respect to wells and pools already drilled when this act takes effect, to the end that the production will repay reasonable lifting costs

and thus prevent premature abandonment of wells and resulting wastes.

Excess production prohibited. After the effective date of any rule, regulation or order made by the supervisor in accordance with under the provisions of this act fixing the allowable production, no person shall produce more than the allowable production applicable to him, his wells, leases or properties, and the allowable production shall be produced in accordance with such applicable rules, regulations or orders. As amended P.A.1961, No. 131, § 1, Eff. Sept. 8.

319.14 Certificates of clearance or tender

Sec. 14. The supervisor shall have authority to issue certificates of clearance or tenders whenever the same may be required to effectuate the purposes of this act.

319.15 Illegal oil, unlawful to deal in; penalty

Sec. 15. It shall be unlawful for any person to sell, purchase, acquire, transport, refine, process or otherwise handle or dispose of any illegal oil in whole or in part, or any illegal product of oil: Provided, That no penalty nor forfeiture shall be imposed on account of any such act until certificates of clearance or tenders have been required by the supervisor as provided in section 14 hereof.¹

319.16 Public hearings to be held before adoption of rules, regulations or orders except emergency orders; notice of hearing

Sec. 16. No rules, regulations or orders shall be made, promulgated, put into effect, revoked, changed, renewed or extended except emergency orders hereinafter provided for until and unless public hearings shall be held thereon. Public hearings shall be held at such time, place and manner and upon such notice, not less than 10 days, as shall be prescribed by general

1. Section 319.14.

order and rules adopted in conformity with this act. The supervisor shall have authority to promulgate and put in effect emergency rules, regulations or orders without a public hearing that may be necessary to carry out the provisions of this act: Provided, That such emergency rules, regulations and orders shall in no event remain in force and effect more than 21 days.

319.17 Actions against supervisor or commission; Ingham county circuit court, jurisdiction; injunction or restraining order only after hearing

Sec. 17. The circuit court of Ingham county shall have exclusive jurisdiction of all suits brought against the commission, the supervisor, the board or any agent or employee thereof, by or on account of any matter or thing arising under the provisions of this act. No temporary restraining order or injunction shall be granted in any such suit except after due notice and for good cause shown.

319.18 Supervisor, actions by, to enforce act; jurisdiction; attorney general to represent

Sec. 18. The supervisor shall have power to bring proceedings at law or in equity for the enforcement of the provisions of this act and all rules and regulations promulgated thereunder or for the prevention of the violation thereof, and the attorney general shall represent the supervisor in all actions brought under this act. The circuit court of Ingham county shall have concurrent jurisdiction thereof.

319.18a Failure of owner or operator of oil well or test hole to case, plug or repair; notice of determination by supervisor of wells, service; liability; claims

Sec. 18a. Whenever the supervisor of wells shall determine that the owner or operator of any oil well or test hole shall have failed or neglected to properly case, plug or repair the same in accordance with the provisions of this act or the rules and regu-

lations promulgated thereunder, the supervisor of wells shall give notice of such determination, in writing, to the said owner or operator and to the surety executing the bond filed with the said supervisor of wells by such owner or operator in connection with the issuance of the permit authorizing the drilling of said oil well or test hole. This notice of determination may be served upon said owner or operator and surety in person or by registered mail. If the owner or operator cannot be found in the State of Michigan, the mailing of the notice of determination to such owner or operator at his last known post office address by registered mail shall constitute service of same. If the said owner or operator, or surety, shall fail or neglect to properly case, plug or repair the oil well or test hole described in the notice of determination herein provided for within 30 days of the date of service or mailing of such notice, the supervisor of wells may enter into and upon any private or public property on which the oil well or test hole is located and upon and across any private or public property necessary to reach same, and case, plug or repair said oil well or test hole, and the owner or operator and surety shall be jointly and severally liable for all expenses incurred by the supervisor of wells in doing same. The supervisor of wells, acting for and in behalf of the state of Michigan, shall certify in writing to the said owner or operator and surety the claim of the state in the same manner herein provided for the service of the notice of determination, and shall list thereon the items of expense incurred in casing, plugging or repairing the said oil well or test hole. Such claim shall be paid by the owner or operator, or surety, within 30 days, and if not paid within that time the supervisor of wells, acting for and in behalf of the state, may bring suit against such owner or operator, or surety, jointly or severally, for the collection of same in any court of competent jurisdiction in the county of Ingham. P.A.1939, No. 61, § 18a, added by P.A.1951, No. 190, § 1, Eff. Sept. 28, 1951.

319.18b Abandoning oil well or test hole without properly plugging, penalty; owner or operator defined

Sec. 18b. Any person who shall abandon any oil well or test hole without properly plugging the same in accordance with this act or the rules and regulations promulgated thereunder, whether as principal, agent, servant or employee, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of \$100.00 and costs of prosecution, or imprisonment in the county jail for a period not exceeding 90 days, or both such fine and imprisonment in the discretion of the court. Nothing herein contained shall be construed as imposing any liability upon the owner of any land upon which any oil well or test hole is located, unless he be the owner or part owner of the said well or test hole. The words "owner or operator" as used in section 18a of this act¹ shall refer to the person or persons who, by the terms of this act and the rules and regulations promulgated thereunder, are made responsible for the plugging of any well or test hole. P.A.1939, No. 61, § 18b, added by P.A.1951, No. 190, § 1, Eff. Sept. 28, 1951.

319.19 Penal acts; punishment

Sec. 19. Any person who, for the purpose of evading this act, or of evading any rule, regulation or order made hereunder, shall intentionally make, or cause to be made, false entry or statement of fact in any report required by this act or by any rule, regulation or order made hereunder, or who, for such purpose, shall make or cause to be made false entry in any account, record, or memorandum kept by any person in connection with the provisions of this act, or of any rule, regulation or order made thereunder; or who, for such purpose, shall omit to make, or cause to be omitted, full, true, and correct entries in such accounts, records, or memoranda, of all facts and transactions pertaining to the interest or activities in the

1. Section 319.18a.

petroleum industry of such person as may be required by the supervisor under authority given in this act or by any rule, regulation or order made hereunder; or, who, for such purpose, shall remove out of the jurisdiction of the state, or who shall mutilate, alter, or by any other means falsify any book, record, or other paper pertaining to the transactions regulated by this act, or by any rule, regulation or order made hereunder; shall be deemed guilty of a felony and shall be subject, upon conviction in any court of competent jurisdiction, to a fine of not more than \$1,000.00, or imprisonment for a term of not more than 3 years, or to both such fine and imprisonment.

319.20 Civil penalty; enforcement

Sec. 20. Except as penalty is herein otherwise especially provided for, any person who violates any provision of this act or any rule, regulation or order promulgated hereunder shall be subject to a penalty of not exceeding \$1,000.00 and each day that violation shall continue shall constitute a separate offense. Said penalty shall be recovered by suit brought by the supervisor.

Any person aiding or abetting in the violation of any provision of this act, or any rule, regulation or order made thereunder, shall be subject to the same penalties as are prescribed herein.

319.21 Illegal oil, confiscation; seizure; action, jurisdiction, procedure; right of claimant to intervene; sale

Sec. 21. All illegal oil and products derived from illegal oil and conveyances used in the transportation thereof and containers used in the storage thereof except railroad tank cars and oil pipe lines shall be subject to confiscation and the supervisor is hereby empowered and authorized to seize such illegal oil, illegal oil products, conveyances and containers. The supervisor shall immediately upon such seizure institute a proceeding in rem to confiscate said illegal oil, illegal oil products, conveyances and containers in the circuit court of the county in which such seizure was made or in the circuit court of Ingham county.

Upon commencement of such proceedings such notice shall be given to all known interested persons in such manner as the court shall direct. The court, upon finding that said oil or said oil products or said conveyances or containers so seized are illegal as herein defined, shall order the same to be sold under such terms and conditions as it may direct. Any person claiming an interest in any oil or oil product or conveyance or container so seized shall have the right to intervene in said proceedings and the rights of such person shall be determined by the court as justice may require.

319.22 Severance tax

Sec. 22. A privilege fee of $\frac{1}{8}$ of 1 cent per barrel shall be paid upon oil produced in Michigan and sold. This fee shall be levied and collected by the department of revenue in the same manner and subject to the same provisions as the tax levied under the provisions of Act No. 48 of the Public Acts of 1929,¹ as amended, being sections 205.301 to 205.317 of the Compiled Laws of 1948. All moneys received from this source shall be credited to the general fund. As amended P.A. 1966, No. 262, § 1, Imd. Eff. July 12.

319.23 Permit to drill well; application, conditions and requirements; fees; records, inspection

Sec. 23. No person shall drill or begin the drilling of any well for oil and gas, geological information, key well for secondary recovery, or a well for the disposal of salt water, brine or other oil field wastes, or wells for the storage of dry natural gas or casinghead gas, or wells for the development of reservoirs for the storage of liquid petroleum gas, until the owner directly or through his authorized representatives shall have first made a written application to drill any such well and filed with the supervisor a satisfactory surety bond as provided in section 6 of

1. Section 205.301 et seq.

this act,¹ and received and posted in a conspicuous place at the location of the well a permit in accordance with the rules, regulations and requirements or orders made and promulgated by the supervisor. A fee of \$25.00 shall be charged for a permit to drill wells for oil and gas, wells for the storage of dry natural gas or casinghead gas, or wells for the development of reservoirs for the storage of liquid petroleum gas, and a fee of \$1.00 shall be charged for a permit to drill a well for geological information, a key well for secondary recovery, and wells for the disposal of salt water, brine or other oil field wastes. Upon receiving such written application and payment of the fee required, the supervisor shall within 5 days thereafter issue to any owner or his authorized representative, a permit to drill such well: Provided, however, That no permit to drill a well shall be issued to any owner or his authorized representative who does not comply with the rules, regulations and requirements or orders made and promulgated by the supervisor: And provided further, That no permit shall be issued to any owner or his authorized representative who has not complied with or is in violation of this act, or any of the rules, regulations, requirements or orders issued by the supervisor, or the department of conservation.

The supervisor shall thereupon pay such permit fee into the state treasury and it shall there be credited to the general fund of the state.

All information and records with reference to the issuance of permits for drilling of any core or test well or for geological information including the permit, shall be held confidential for 6 months after completion of such well, and shall not be open for public inspection during that time. As amended P.A. 1961, No. 131, § 1, Eff. Sept. 8.

1. Section 319.6.

319.24 Act cumulative of other law; repeal

Sec. 24. This act shall be cumulative of all existing laws on the subject matter, but, in case of conflict, this act shall control and shall repeal such conflicting provisions. Act No. 15 of the Public Acts of 1929, as amended, being sections 5696 to 5712, inclusive, of the Compiled Laws of 1929, is hereby repealed.

319.25 Repealed**319.26 Repealed. P. A. 1961, No. 131, § 2, Eff. Sept. 8****319.27 Drill holes, test holes and wells not subject to act**

Sec. 27. The provisions of this act shall not apply to drill holes for the exploration and the extraction of iron, copper, or brine, to water wells, to mine and quarry drill and blast holes, nor to coal test holders, nor to seismograph or other geophysical exploration test holes.

APPENDIX P**DEPARTMENT OF CONSERVATION ACT****P. A. 1921, No. 17, Imd. Eff. March 30**

AN ACT to provide for the protection and conservation of the natural resources of the state; to provide and develop facilities for outdoor recreation; to create a conservation department; to define the powers and duties thereof; to provide rules and regulations concerning the use and occupancy of lands and property under its control and penalties for the violation thereof; to provide for the transfer to said department of the powers and duties now vested by law in certain boards, commissions and officers of the state; and for the abolishing of the boards, commissions and offices the powers and duties of which are hereby transferred. As amended P.A.1927, No. 337, Eff. Sept. 5.

The People of the State of Michigan enact:

299.1 Department of conservation, creation, powers and duties; commission of conservation, appointment, terms, meetings, compensation; oath; director, salary, vacancy

Sec. 1. There is hereby created a department of conservation for the state of Michigan which shall possess the powers and perform the duties hereby granted and imposed. The general administration of said powers and duties shall be vested in a commission of conservation which shall be composed of 7 members appointed by the governor, subject to confirmation by the senate. The members of said commission shall be selected with special reference to their training and experience along the line of 1 or more of the principal lines of activities vested in the department of conservation and their ability and fitness to deal

therewith: Provided, That 2 of these members shall reside in the upper peninsula. The term of office of each member of the commission shall be six years: Provided, That of those first appointed, 3 shall be appointed for 2 years, 2 for 4 years and 2 for 6 years. The governor shall fill any vacancy occurring in the membership of the commission and may remove any member of the commission for cause after a hearing. Each member of this commission shall hold his office until the appointment and qualification of his successor. The commission, after having qualified, shall within 30 days and annually thereafter meet at its office in Lansing and organize by electing a chairman and appointing a secretary, who need not be a member of the commission. Four members of said commission shall constitute a quorum for the transaction of business. Meetings may be called by the chairman and shall be called on request of a majority of the members of the commission and may be held as often as necessary and at other places than the commissioners' offices at Lansing: Provided, That 1 meeting shall be held each month. The commission shall appoint and employ a director of conservation who shall continue in office at the pleasure of the commission and who shall receive a salary of not to exceed \$12,000.00 per annum. The director shall appoint with the approval of the commission a deputy director and such assistants and employees as may be necessary to carry out the provisions of this act, or of any other law of the state affecting the powers and duties of said department. The deputy director is hereby authorized to perform any duty or exercise any power conferred by law upon the director whenever and to the extent such duty and power shall be delegated to him by the director. Should there be a vacancy in the office of director, or should he be unable to perform his duties or be absent from the state, all of the powers and duties of the director as prescribed by law shall devolve upon the deputy director until such time as the vacancy is filled, or the director's inability or absence from the state ceases. The compensation of said deputy director and all such assistants and employees and

the number thereof shall be subject to the approval of the state administrative board. The members of the commission shall receive no compensation hereunder, but each such member, and the other officers and employees of the department, shall be entitled to reasonable expenses while traveling in the performance of any of the duties hereby imposed. All salaries and expenses authorized hereunder shall be paid out of the state treasury in the same manner as the salaries of other state officers and employees are paid. It shall be the duty of the board of state auditors to furnish suitable offices and office equipment, at the city of Lansing, for the use of the conservation department. Each member of the commission and the director of conservation shall qualify by taking and subscribing the constitutional oath of office, and filing same in the office of the secretary of state. As amended P.A.1949, No. 250, § 1, Imd. Eff. June 6; P.A.1951, No. 182, § 1, Imd. Eff. June 8.

299.2 Same; powers and duties transferred from abolished commissions and boards; records; rules and regulations; mineral products, contracts for taking and storage; game and fish protection fund moneys

Sec. 2. The powers and duties now vested by law in the public domain commission; the state game, fish and forest fire commissioner, the state board of fish commissioners; the geological survey; and the Michigan state park commission are hereby transferred to and vested in the conservation department. Whenever, in any law of the state, reference is made to any board, commission or officer whose powers and duties are thus transferred, reference shall be deemed to be made to the conservation department. On the taking effect of this act the public domain commission, the state board of fish commissioners, the geological survey, the Michigan state park commission, and the office of state game, fish, and forest fire warden shall be abolished; and all records, files and papers of every nature pertaining to the functions thereof shall be turned over to the conserva-

tion department, to be preserved as a part of the records and files of the department hereby created. Any hearing or other proceeding pending before any commission or board hereby abolished shall not be abated but shall be carried on and determined by the commission of conservation in accordance with the provisions of the law governing such hearing and proceeding. The commission hereby created may adopt such rules and regulations, not inconsistent with law, governing its organization and procedure, and the administration of the provisions of this act, as may be deemed expedient. Said commission may also make and enforce reasonable rules and regulations concerning the use and occupancy of lands and property under its control; may provide and develop facilities for outdoor recreation; may conduct such investigations as it may deem necessary for the proper administration of this act; and may remove and dispose of forest products, incidental as required for the protection, reforestation and proper development and conservation of the lands and property under its control. The said commission is hereby empowered to make contracts with persons, firms, associations and corporations for the taking of coal, oil, gas and other mineral products from any state owned lands, upon a royalty basis or upon such other basis and upon such terms as to said commission shall be deemed just and equitable: Provided, That said powers shall include and shall be deemed to have included the making of contracts as aforesaid for the storage of gas or other mineral products in or upon any state-owned lands: Provided, however, That the consent of the state agency having jurisdiction and control of the state owned land be first obtained: Provided further, That no such contract, for the taking of coal, oil, gas or other mineral products, or for the storage of gas or other mineral products, shall be valid unless same shall have been approved by the state administrative board. All moneys received from this source, except moneys received from lands acquired with game and fish protection funds, shall be turned into the general fund of the state to be used for the purpose of defraying

the expenses incurred in the administration of this act and such other purposes as are or may be provided by law. From lands acquired with game and fish protection funds such moneys shall be turned into the game and fish protection fund and used only for the purposes provided by law. As amended P.A.1949, No. 19, § 1, Eff. Sept. 23; P.A.1952, No. 78, § 1, Eff. Sept. 18; P.A.1963, No. 204 § 1, Eff. Sept. 6.

299.3 Same; duties; natural resources, outdoor recreation; destruction of timber; reforestation; pollution; protection of game and fish; gifts; acquisition and lease of property

Sec. 3. It is hereby made the duty of the conservation department to protect and conserve the natural resources of the state of Michigan; to provide and develop facilities for outdoor recreation; to prevent the destruction of timber and other forest growth by fire or otherwise; to promote the reforesting of forest lands belonging to the state; to prevent and guard against the pollution of lakes and streams within the state, and to enforce all laws provided for that purpose with all authority granted by law, and to foster and encourage the protecting and propagation of game and fish. On behalf of the people of the state the commission of conservation may accept gifts and grants of land and other property and shall have authority to buy, sell, exchange or condemn land and other property, for any of the purposes contemplated by this act. The department of conservation may lease lands owned or controlled by it which have been designated for use for recreational purposes, but only to responsible legal units, within this state, of national or state recognized groups devoted principally to development of character and citizenship training and physical fitness of youth, the financial support of which is by voluntary public subscriptions or contributions, and the property of which is exempt from taxation under the laws of this state, and the department of conservation shall also have the authority to lease land in the porcupine mountain state park to third

parties for such purposes as it shall consider desirable: Provided, That any lease so made shall contain provisions limiting the purposes for which the land so leased is to be used and a provision authorizing the department of conservation to terminate said lease upon a finding that the land is being used for purposes other than as so limited or contrary to the intent hereof. As amended P.A. 1952, No. 215, § 1, Eff. Sept. 18.

299.3a Conservation commission; rules and regulations for protection of lands and property, contents, publication, authentication; restriction; violation, penalty

Sec. 3a. The commission of conservation shall make such rules and regulations for protection of the lands and property under its control against wrongful use or occupancy as will insure the carrying out of the intent of this act to protect the same from depredations and to preserve such lands and property from molestation, spoliation, destruction or any other improper use or occupancy thereof. All such rules and regulations shall clearly and distinctly set forth the act required to be done or prohibited from being done, together with the places, areas and conditions affected thereby and shall also clearly specify and set forth the length of time during which the same shall remain in force and effect. There shall be added to all such rules and regulations a clause stating the penalties hereinafter provided for violation of the same. Said rules and regulations shall be published for 3 successive weeks before the effective date thereof, in 1 or more newspaper published or circulated in or near the county, place or area affected thereby. A copy of each rule or regulation as published shall be filed with each county clerk in the county affected thereby and shall also be posted in 1 or more public and conspicuous places at or near the places and areas affected thereby before the effective date thereof. Proof of the publication thereof shall be filed with the commission and as long as such rules or regulations remain in force and effect a copy thereof shall be included and printed in the authorized biennial

compilation of the fish and game laws: Provided, That the original of all such rules and regulations on file in the Lansing office of the department of conservation shall be under the seal of the conservation department and shall bear the signature of the chairman of said commission of conservation and of the director of conservation: Provided further, Nothing herein contained shall be deemed as allowing the commission of conservation to make any rule or regulation to prevent the free use of any state park or to make any rule or regulation which applies to commercial fishing except as provided by law. Any person who shall do or perform any act prohibited by such rules and regulations or who shall fail, refuse or neglect to do or perform any act required by such rules and regulations concerning the use and occupancy of lands and property under the control of said commission of conservation, which shall have been made, promulgated and published as in this act provided, during the time such rules or regulations shall be in force and effect, or who shall violate any such rules or regulations thus made, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not more than \$100.00, together with costs of prosecution, or to imprisonment in the county jail for not more than 90 days, or both such fine and imprisonment in the discretion of the court. As amended P. A. 1955, No. 157, § 1, Eff. Oct. 14.

299.3b Federal fish stock and programs, application; condition

Sec. 3b. The conservation commission or department of conservation, in pursuing the state's policy of propagating fish for the purpose of stocking the streams and lakes of the state, shall not refuse to accept federal fish stock for such programs, and shall apply for all federal fish stock programs which do not commit the state to future expenditures. The department shall provide a listing to the legislature of all federal fish stock programs by April 15 of each year. P. A. 1921, No. 17, § 3b, added by P. A. 1966, No. 101, § 1, Eff. March 10, 1967.

299.4 Department of conservation; biennial report, printing

Sec. 4. On or before the fifteenth day of January of each year in which a regular session of the legislature is held, the director of conservation shall make to the governor and legislature, a report covering the operation of his department for the preceding biennial period. Such report shall, if so ordered by the board of state auditors, be printed and shall be distributed in such manner and to such persons, organizations, institutions and officials as said board may direct.

299.5 [Repealed]**299.6 Declaration of necessity**

Sec. 6. This act is hereby declared to be immediately necessary for the preservation of the public peace, health and safety.

APPENDIX Q**ENVIRONMENTAL PROTECTION ACT OF 1970****P. A. 1970, No. 127, Eff. Oct. 1**

AN ACT to provide for actions for declaratory and equitable relief for protection of the air, water and other natural resources and the public trust therein; to prescribe the rights, duties and functions of the attorney general, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity; and to provide for judicial proceedings relative thereto.

The People of the State of Michigan enact:

691.1201 Short title

Sec. 1. This act, shall be known and may be cited as the "Thomas J. Anderson, Gordon Rockwell environmental protection act of 1970".

P. A. 1970, No. 127, § 1, Eff. Oct. 1.

691.1202 Actions for declaratory and equitable relief; standards for pollution or anti-pollution devices or procedure

Sec. 2. (1) The attorney general, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against the state, any political subdivision

thereof, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity for the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction.

(2) In granting relief provided by subsection (1) where there is involved a standard for pollution or for an anti-pollution device or procedure, fixed by rule or otherwise, by an instrumentality or agency of the state or a political subdivision thereof, the court may:

(a) Determine the validity, applicability and reasonableness of the standard.

(b) When a court finds a standard to be deficient, direct the adoption of a standard approved and specified by the court.

P. A. 1970, No. 127, § 2, Eff. Oct. 1.

691.1202a Surety bonds or cash, posting to secure costs or judgments

Sec. 2a. If the court has reasonable ground to doubt the solvency of the plaintiff or the plaintiff's ability to pay any cost or judgment which might be rendered against him in an action brought under this act the court may order the plaintiff to post a surety bond or cash not to exceed \$500.00.

P. A. 1970, No. 127, § 2a, Eff. Oct. 1.

691.1203 Prima facie showing of pollution; rebuttal; affirmative defense; burden of proof; weight of evidence; masters or referees; costs, apportionment

Sec. 3. (1) When the plaintiff in the action has made a prima facie showing that the conduct of the defendant has, or is likely to pollute, impair or destroy the air, water or other natural resources or the public trust therein, the defendants may rebut the prima facie showing by the submission of evidence to the contrary. The defendant may also show, by way of an affirmative

defense, that there is no feasible and prudent alternative to defendant's conduct and that such conduct is consistent with the promotion of the public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment or destruction. Except as to the affirmative defense, the principles of burden of proof and weight of the evidence generally applicable in civil action in the circuit courts shall apply to actions brought under this act.

(2) The court may appoint a master or referee, who shall be a disinterested person and technically qualified, to take testimony and make a record and a report of his findings to the court in the action.

(3) Costs may be apportioned to the parties if the interests of justice require.

P. A. 1970, No. 127, § 3, Eff. Oct. 1.

691.1204 Granting equitable relief, imposition of conditions; remitting parties to other proceedings; review

Sec. 4. (1) The court may grant temporary and permanent equitable relief, or may impose conditions on the defendant that are required to protect the air, water and other natural resources or the public trust therein from pollution, impairment or destruction.

(2) If administrative, licensing or other proceedings are required or available to determine the legality of the defendant's conduct, the court may remit the parties to such proceedings, which proceedings shall be conducted in accordance with the subject to the provisions of Act No. 306 of the Public Act of 1969, being sections 24.201 to 24.313 of the Compiled Laws of 1948. In so remitting the court may grant temporary equitable relief where necessary for the protection of the air, water and other natural resources or the public trust therein from pollution, impairment or destruction. In so remitting the court shall retain jurisdiction of the action pending completion thereof

for the purpose of determining whether adequate protection from pollution, impairment or destruction has been afforded.

(3) Upon completion of such proceedings, the court shall adjudicate the impact of the defendant's conduct on the air, water or other natural resources and on the public trust therein in accordance with this act. In such adjudication the court may order that additional evidence be taken to the extent necessary to protect the rights recognized in this act.

(4) Where, as to any administrative, licensing or other proceeding, judicial review thereof is available, notwithstanding the provisions to the contrary of Act No. 306 of the Public Acts of 1969, pertaining to judicial review, the court originally taking jurisdiction shall maintain jurisdiction for purposes of judicial review.

P. A. 1970, No. 127, § 4, Eff. Oct. 1.

691.1205 Intervention; determination as to pollution; collateral estoppel; res judicata

Sec. 5. (1) Whenever administrative, licensing or other proceedings, and judicial review thereof are available by law, the agency or the court may permit the attorney general, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity to intervene as a party on the filing of a pleading asserting that the proceeding or action for judicial review involves conduct which has, or which is likely to have, the effect of polluting, impairing or destroying the air, water or other natural resources or the public trust therein.

(2) In any such administrative, licensing or other proceedings, and in any judicial review thereof, any alleged pollution, impairment or destruction of the air, water or other natural resources or the public trust therein, shall be determined, and no conduct shall be authorized or approved which does, or is likely

to have such effect so long as there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety and welfare.

(3) The doctrine of collateral estoppel and res judicata may be applied by the court to prevent multiplicity of suits.

P. A. 1970, No. 127, § 5, Eff. Oct. 1.

691.1206 Supplementary to existing administrative and regulatory procedures

Sec. 6. This act shall be supplementary to existing administrative and regulatory procedures provided by law.

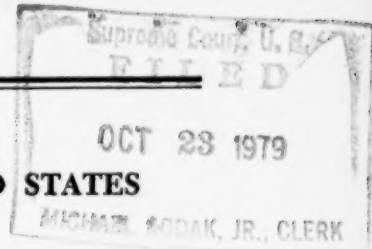
P. A. 1970, No. 127, § 6, Eff. Oct. 1.

691.1207—Effective date

Sec. 7. This act shall take effect October 1, 1970.

P. A. 1970, No. 127, § 7, Eff. Oct. 1.

**IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979**



No. 79-476

**MICHIGAN OIL COMPANY, a Michigan Corporation,
Petitioner,**

vs.

**NATURAL RESOURCES COMMISSION and SUPERVISOR
OF WELLS and PIGEON RIVER COUNTRY
ASSOCIATION,
Respondents.**

**ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF MICHIGAN**

BRIEF IN OPPOSITION

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OPINIONS BELOW

Respondents Natural Resources Commission and Supervisor of Wells accept Petitioner's statement of the opinions below.

JURISDICTION

Respondents Natural Resources Commission and Supervisor of Wells accept Petitioner's statement of jurisdiction.

QUESTIONS PRESENTED

Was Respondents Natural Resources Commission and Supervisor of Wells' denial of a drilling permit for Petitioner Michigan Oil Company an unconstitutional taking of the value of the lease in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States?

Was Respondents' denial of a drilling permit for Michigan Oil on Corwith 1-22 an unconstitutional impairment of contract?

Was Michigan Oil denied due process when the Natural Resources Commission ruled, as sustained by three appellate courts, that the unnecessary damage under the Michigan Oil Conservation Act indeed included damage to the environment?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondents Natural Resources Commission and Supervisor of Wells would not add to the constitutional provisions and statutes itemized in Michigan Oil's Petition and Appendix to Petition.

STATEMENT OF THE CASE

Michigan Oil fails to provide "[a] concise statement of the case containing the facts material to the consideration of the questions presented." Supreme Court Rule 23(1) (c). The "concise statement" contains only facts possibly favorable, or imposing the least damage, to Michigan Oil's Petition.[1].

[1]

More than 4 pages of Michigan Oil's statement is a recitation of the findings of the hearings examiner favorable to Michigan Oil. (App A, A5).

The operative facts in this cause as found by the Michigan Supreme Court are:

"Background

Corwith, 1-22, the 40-acre site involved in the instant controversy, is located in the Pigeon River Country State Forest (hereinafter the Pigeon River Forest or Forest) which consists of 92,872 acres of rolling hills, deep swamps, high forests, lakes and streams. Located in Otsego and Cheboygan Counties, the Pigeon River Forest is one of the largest remaining tracts of publicly owned, wild, undeveloped land in the lower peninsula. Two of the state's highest quality trout streams, the Pigeon and Black Rivers, flow through the Forest. The Pigeon River Forest provides one of the few remaining favorable habitats in the lower peninsula for wildlife, including bear, bobcat, beaver, woodcock, osprey, eagle, and many other birds and animals.

The Forest is also the home of the largest remaining elk herd east of the Mississippi River. In fact, Section 22, containing Corwith 1-22, is in the heart of a 25-square-mile area of semi-wilderness which is the favored habitat of the elk harem.

Another natural resource, oil, one which provides great opportunity for profit, has also been found in the Forest. Thus, in 1968, when the Department of Natural Resources (DNR) sold oil and gas leases covering more than one-half million acres of state-owned land in the northern lower peninsula, it is not surprising that more than 10% or 57,669 of those acres were located in the Pigeon River Forest. As a consequence, more than one-half of this special Forest was leased for gas and oil development. Prior to the sale of the leases, no environmental assessment was made of the property to be leased. In fact, the

regional office of the DNR was given only nine days to review the almost 60,000 acres prior to the proposed sale. The DNR received \$1,122,788 from the 1968 auction of oil and gas leases, or an average of \$2.06 an acre.

The first permit to drill on state-owned land in the Pigeon River Forest, pursuant to a 1968 lease, was issued in May of 1970. On September 16, 1970, after only two drilling permits had been issued, Governor William G. Milliken urged the NRC [the Michigan Natural Resources Commission] to establish a moratorium on the issuance of drilling permits for state land . . . Subsequent to the moratorium, drilling permits were granted for state-owned land only in areas already damaged by oil development. During and subsequent to the moratorium, permits were issued for drilling on private land. Nevertheless, no drilling permit was issued within the 25-square-mile area surrounding Corwith 1-22, the proposed drilling site involved in the present controversy.

Corwith 1-22

State of Michigan Oil and Gas Lease No. 9656, covering 1,760 acres of Corwith Township including the 160 acres comprising the southeast 1/4 of Section 22 was purchased by Pan American Petroleum Corporation. In December of 1968, Pan American assigned an undivided 50% interest in this lease to Northern Michigan Exploration Company and Amoco Production Company. In April of 1971, Northern Michigan Exploration and Amoco applied for a permit to drill a well on the southwest 1/4 of the southeast 1/4 of Section 22 of Corwith Township, a 40-acre site. On October 11, 1971, the Supervisor of Wells denied the application on the grounds that oil and gas drilling on the site would cause 'serious and unnecessary damage' to various wildlife in the area, the swamp in the area would

be affected, and the drilling would cause a 'serious intrusion into a nearly solid block of semi-wilderness area of state lands'. The denial specifically stated that *no* site in the 40 acres was acceptable. No appeal was made from this permit denial.

With full knowledge of this denial, because of his membership on the Oil and Gas Advisory Board of the Supervisor of Wells, Vance W. Orr, Vice President of McClure Oil Company and President of Michigan Oil Company, accepted on behalf of McClure Oil an assignment of the lease rights to this 40-acre site in Section 22 of Corwith Township. 'For and in consideration of the sum of One Dollar (\$1.00) * * * and other valuable considerations,' Northern Michigan Exploration and Amoco assigned to McClure Oil Company their interest in Lease No. 9656 covering the 40-acre site in Section 22. Four months later, in May of 1972, McClure Oil entered into a contract with its wholly-owned subsidiary, Michigan Oil Company. Under the terms of the contract, Michigan Oil would receive assignment of the leasehold interest, if Michigan Oil could obtain a drilling permit and then drill a commercial producing well on the 40-acre site referred to as Corwith 1-22.

The Drilling Permit

Within two weeks of the contract agreement, Michigan Oil filed the second application for a permit to drill a well on Corwith 1-22. This second application was also denied by the Supervisor of Wells, in a letter dated July 21, 1972 . . .

With nothing to lose and everything to gain, Michigan Oil, the potential assignee of McClure Oil's leasehold interest, appealed the denial of its permit application to

the NRC. The NRC appointed a hearing examiner to conduct the administrative hearing. The Pigeon River Country Association intervened under the Michigan Environmental Protection Act (MEPA), MCL 691.1205(1); MSA 14.528(205)(1). The hearing examiner ruled, however, that the intervention was untimely and that the environmental protection act could not be raised. The examiner further ruled that the parties were limited to issues raised by the initial parties in their pretrial statements.

The hearing examiner filed a written report, adopting almost verbatim Michigan Oil's proposed findings of fact and conclusions of law, recommending that the drilling permit be issued. The NRC, after reviewing the record, the briefs and the proposed findings of fact, rejected the recommendations of the hearing examiner and upheld the denial of Michigan Oil's application for a drilling permit. On May 9, 1974, the NRC issued its decision specifically finding the following:

'Damage to the ecosystem and serious or unnecessary damage to animals would be caused by opening entrance roads, truck traffic, succession of wells and general activities encountered in all oil-gas production. Particularly, serious effects would be caused to elk, bear and bobcat and could cause their virtual removal from a portion of the Pigeon River area. The tendency of the animals would be to avoid the area. Such effect would be particularly noticeable in the case of elk who are a wide ranging animal (Moran, T-2142; Harger, T-2243; Black, T-1331, 1332, 1333, 1352; Moore, T-1710; Johnson, T-1782, 1784-1786, 1819, 1924; Strong, T-1823, 1824).

'The Pigeon River area is the last stronghold of the bear and bobcat. Places where bear and bobcat can live are

limited. Section 22 is good bear habitat (Johnson, T-1786, 1823; Harger, T-2246).

'Elk would be particularly affected by an oil operation because of their fragile nervous system and even clearing one acre will affect them. In turn, many small animals would be affected (Johnson, T-1823; Strong, T-1888, 1889; Moran, T-2152).

'The above testimony from game biologists as to the effect of the drilling of a well in this area comes from the DNR presentation and the opinions of their experts are un rebutted on the record. On considering the foregoing testimony the Commission must find that damage to or destruction of the surface, soils, animals, fish or aquatic life will occur.' (Emphasis added.)

On appeal, the denial of the drilling permit for Corwith 1-22 was affirmed by the Ingham Circuit Court and by the Court of Appeals. *Michigan Oil Co v Natural Resources Comm*, 71 Mich App 667; 249 NW2d 135 (1976)." (App A, A1-6).

REASONS FOR DENYING THE WRIT

In its Petition, Michigan Oil attempts to transform what were, before the Michigan Courts, back-of-the-brief constitutional arguments into matters of such great federal significance that this Court must intervene. This dispute, however, has been, and remains today, a question of state law.

Three members of the majority in the Michigan Supreme Court concluded that both the Michigan Oil Conservation Act and the Natural Resources Department Act provided the Michigan Natural Resources Commission, based on the facts

in this cause, sufficient statutory grounds to deny Michigan Oil's application to drill on Corwith 1-22.^[2] The fourth Justice of the majority concluded that the Michigan Oil Conservation Act, by itself, provided sufficient statutory grounds for the denial of the Application to Drill:

"I cannot subscribe to a construction of the Oil Conservation Act which would limit the DNR's duty to protect the whole environment as it is affected by the drilling of oil wells.

There is adequate evidentiary support for the Commission's determination that drilling the proposed well would result in damage to animal life.

Its conclusion that this amounts to waste included in the proscription of the statute comports with my understanding of the legislative intent in writing this law. While it is true the express, primary concern of the Oil Conservation Act is with the prevention of waste of oil itself, I cannot read the Act as ignoring, let alone approving, all incidental damage to other natural resources." (App R p 1).^[3]

The dissent concluded that the Michigan Oil Conservation Act and the Natural Resources Department Act did not justify denial of a permit in the present case. None of the dissenters

[2]

Michigan Oil Conservation Act, 1939 PA 61, MCL 319.1 *et seq*; MSA 13.139(1) *et seq*. Natural Resources Department Act, 1921 PA 17, MCL 299.1 *et seq*; MSA 13.1 *et seq*.

[3]

Justice Kavanagh's opinion does not appear in Petitioner's Appendix. The full text of Justice Kavanagh's opinion does appear in Appendix R, following this Brief.

would, however, have directed the issuance of a drilling permit to Michigan Oil. Two would have remanded the matter back to the Natural Resources Commission for hearing under the Michigan Environmental Protection Act (MEPA). The third Justice would have remanded to the circuit court for proceedings under MEPA.^[4]

The Natural Resources Commission, the Ingham Circuit Court, the Michigan Court of Appeals and the Michigan Supreme Court found that the Application to Drill on Corwith 1-22 within the Pigeon River Country State Forest was properly denied under the Michigan Oil Conservation Act and the Natural Resources Department Act. That was the arena of dispute. The Supreme Court will not, of course, review a state court judgment based upon an adequate and independent state ground. *Herb v Pitcairn*, 324 US 117 (1945).

A. The Denial of Michigan Oil's Application to Drill Involved No Unconstitutional Taking of Property.

Petitioner charges:

"It [the state] purports to have eliminated every right Petitioner ever had in the lease and has done so totally

[4]

In the related *West Michigan Environmental Action Council v Natural Resources Commission*, 405 Mich 741, 760; 275 NW2d 538, 545 (1979), the Supreme Court ruled, based upon MEPA that:

"In light of the limited number of the elk, the unique nature and location of this herd, and the apparently serious and lasting, though unquantifiable, damage that will result to the herd from the drilling of the ten exploratory wells, we conclude that defendants' conduct constitutes an impairment or destruction of a natural resource.

Accordingly, we reverse and remand to the trial court for entry of a permanent injunction prohibiting the drilling of the ten exploratory wells pursuant to permits issued on August 24, 1977."

apart from any eminent domain proceedings. If there ever was a total taking without compensation, this is such a case." Petition, p 13.

The Michigan Court of Appeals found this argument wanting:

"It would appear to be clear and undisputed that the fact that appellant's property interest was in the first instance derived from a contract with the state does not and could not thereby exempt that property interest from the proper exercise of the state's police power. . . .

Also undisputed, and of significance in determining whether some property right obtained by appellant pursuant to the Oil and Gas Lease in question has been 'taken', is the fact that the lease was expressly made subject to 'rules and regulations of the Department of Conservation now or hereafter in force'. The sole restriction which the lease purported to make on the Commission's control of the property was that rules and regulations made after the approval of the lease could not affect the 'term of lease, rate of royalty, rental, or acreage', none of which restrictions are relevant to the instant case. . . .

Clearly the lease does not guarantee that the lessee will be permitted to drill for oil. The Commission expressly retained its statutory authority to fulfill its duty to the people of the state of Michigan by regulating the use of state lands and resources placed in its control and held by them as a public trust. . . ." (App A, A67-68).

In addition to the fact that the lease was unequivocally "subject to the rules and regulations of the Department of Conservation now or hereafter in force," it is undisputed that

the lease did not waive the statutory requirement that Michigan Oil obtain a state permit to drill. (App A, A186). The Court of Appeals concluded:

"Since the Commission thus retained its authority to prevent 'molestation, spoliation [or] destruction' of the property in question, as well as to prevent 'waste' in the production of oil and gas on that property . . . a proper exercise of that authority could not result in a taking in the constitutional sense." (App a, A68).

Michigan Oil, when it obtained the 1968 lease from Northern Michigan Exploration and Amoco Oil, received the exclusive opportunity to drill for oil and gas on Corwith 1-22. The state could not allow anyone else to drill for oil and gas on Corwith 1-22 for the term of the lease. The state, however, retained its full regulatory powers. Michigan Oil was free from competition, not regulation.

In its Petition, Michigan Oil cites cases for the proposition that Government may not take private property without compensation. Petitioner cites, for example, *United States v Causby*, 328 US 256 (1946). Causby's peaceful occupation of 2.8 acres with residence and chicken farm was destroyed, when the United States began using an adjacent airport for heavy bombers and other military planes. The Court ruled that the heavy flow of planes just above Causby's property constituted an easement and held the Federal Government liable for inverse condemnation. Also cited by Petitioner is *Pennsylvania Coal Co v Mahon*, 260 US 393 (1922). In its deed to the surface property owner, Pennsylvania Coal reserved the right to remove all of the coal underlying the property. The surface owner specifically waived all claims for damages that might arise from mining the coal. A state law was subsequently enacted, prohibiting the mining of coal in such a way as to cause subsidence to homes. On suit by the private homeowner

to prevent the mining of coal under his property, the Court found an unconstitutional taking of property, since the law rendered mining for coal under Mahon's property impossible.

In each instance, subsequent government action took away existent property rights: Causby's peaceful occupation of his property and chicken farm and Pennsylvania Coal's specifically retained right to mine the coal underlying the property deeded Mahon. In contrast, Michigan Oil's lease for Corwith 1-22 "was expressly made subject to 'rules and regulations of the Department of Conservation now or hereafter in force'" and, from its very birth, was tied to the Commission's statutory duty to regulate state lands.^[5] No property interest was taken from Michigan Oil when the Natural Resources Commission met its retained statutory duty to regulate and preserve the large block of undeveloped state lands and the declining habitat of wild elk, bobcat and bear.

B. The Denial of Michigan Oil's Application to Drill Within the Pigeon River Country State Forest Did Not Violate the Equal Protection Clause of the Fourteenth Amendment.

Michigan Oil admits:

"We have not found any equal protection cases paralleling the situation of Michigan Oil Company." Petition, p 20.

[5]

This distinguishes Michigan's Oil lease from that considered in *Union Oil Co v Morton*, 512 F2d 743 (CA9, 1975). In *Union Oil* the government had yielded any right to the subsequent regulation of oil and gas developers:

"The structure of the Act demonstrates that Congress intended vested rights under the lease to be invulnerable to defeasance by subsequently issued regulations." *Union Oil*, 512 F2d at 750.

Respondents are not surprised. The Ingham Circuit Court found:

"Petitioners apparently contend that the denial of a permit is a denial of equal protection principally for two reasons.

First, a well has been approved as near as two and one-half miles from the proposed site. Petitioners point out that one of the DNR staff members testified that the proposed site and the site two and one-half miles away were 'similar' (Tr 2019) and that he had recommended approval of the other site (Tr. 2019). This standing alone would not be a sufficient showing of arbitrariness to constitute a denial of equal protection. In light of the same staff member going on to explain that shortly after the granting of the other site there was a moratorium and then a change in policy and further that in regards to the other site was only permitted to consider damage to timber and road access (Tr. 2029) where he now, in conjunction with fishery and game biologists, is allowed to consider the entire ecostructure, and finally that the fisheries biologist and game biologist did not recommend approval of the other site, petitioners fall short of their burden.

Secondly, petitioners perceive a denial of equal protection in the now abandoned policy of the DNR that permitted ownership of land to be considered in the granting of a permit. Apparently the prior policy was to place greater restrictions or higher burdens upon those who drilled upon publicly owned land than those who drilled on privately owned land.

... a nonarbitrary reason for such a policy seems readily apparent to the Court. Just as persons who own

land privately must look after their own remainder interest, so must the state concern itself with the remainder interest of Michigan's citizens. This duty would be present even absent the ecologically based considerations in determining waste." (App A, A98-99).

The Michigan Court of Appeals concurred, adding:

"Thus, while drilling permits have been granted in the immediate area surrounding Corwith [actually Charlton] 1-4 and in the immediate areas would not cause additional encroachments into previously undisturbed areas or necessarily cause any further disruption of wildlife living habits in those areas. On the other hand, no permits have been issued for any of the land in the 25-square-mile area surrounding proposed Corwith 1-22, indicating that denial of the instant permit was based on a plan having a rational foundation promoting a legitimate state purpose and therefore constituting no denial of equal protection to appellant." (App A, A73).^[6]

Michigan Oil uses a new diagram, which appears for the first time in its Petition, to substantiate its equal protection claim.^[7] If anything, however, the map belies Petitioner's claim. A large expanse of land does indeed separate Corwith 1-22 from the permitted well sites.

Even more telling are the facts omitted from Michigan Oil's "diagram." All of the wells cited by Michigan Oil were either in the immediate area surrounding Charlton 1-4, in the im-

[6]

The Supreme Court sustained this finding. (App A, A2-3).

[7]

Although the diagram purports to be on a scale of one inch equaling one mile, each one mile side of the township sections are only 3/4 of an inch in the diagram.

mediate area of other wells already drilled before the first application to drill on Corwith 1-22 or on private land based upon the abandoned, by 1972, policy of the DNR that allowed lesser restrictions on those who drilled on privately owned land versus publicly owned land. (App A, A73, A98). Petitioner Michigan Oil ignores these operative facts.

The crux of Michigan Oil's equal protection argument is, in actuality, that the state may never alter its policies. Once a step is taken, Michigan Oil argues that no matter what truths we learn, no matter what impacts are discovered and no matter how society may reassess its values, the state may never alter a policy. The Court of Appeals commented:

"The constitutional guarantee of equal protection of the laws certainly does not mean that a state agency, upon discovering that a former policy was an error, must nevertheless continue to pursue that dangerous policy to the point of destruction." (App A, A72).

C. The Denial of a Drilling Permit for Michigan Oil on Corwith 1-22 Is Not, In Any Manner, An Unconstitutional Impairment of Contract.

Michigan Oil next claims that Respondents have violated US Const, art 1, §10, which provides:

"No State shall . . . pass any . . . law impairing the obligation of Contracts. . . ."

We are not, however, directed to any law of the State of Michigan which unconstitutionally impairs Michigan Oil's "contract" to drill on Corwith 1-22. We are simply told:

"If the Contract Clause means anything at all, it means that the state cannot prohibit drilling and then cancel its

lease as it has tried to do to Michigan Oil Company in the instant case.” Petition, p 20.

The Court of Appeals stated:

“The best that can be said for appellant’s argument is that it confuses the constitutional prohibition against the state enacting laws impairing the obligations of contracts with the state allegedly breaching a contract to which it is a party. It has long been recognized that mere breach of contract by a governmental entity does not constitute an unconstitutional impairment of a contractual obligation. . . . *Shawnee Sewerage & Drainage Co v Stearns*, 220 US 462 . . . (1911).

Furthermore, as noted previously, this lease did not necessarily contemplate that the Supervisor of Wells and the Natural Resources Commission would be required, under any and all circumstances, to issue a drilling permit to the lessee. The commission, by entering into this lease, did not and could not deprive itself of its statutory duty to prevent waste or destruction of the state’s resources under its control. . . .” (App A, A70-71).

D. Michigan Oil Was Not Denied Due Process When The Natural Resources Commission Ruled That Unnecessary Damage Under the Michigan Oil Conservation Act Indeed Included Unnecessary Damage to the Environment.

Lastly, Michigan Oil contends that it had “no notice” that the Oil Conservation Act prohibited unnecessary damage to the environment and, thus, was denied due process:

“Petitioner had no such notice here. At the time of the evidentiary hearing, the sole issue in the case was whether as a result of the drilling, there would be ‘un-

necessary’ damage within the meaning of the Oil Conservation Act. Petitioner’s evidence was designed to meet this claim and the hearing examiner, based on that statute* and Opinion 4718 of the Michigan Attorney General, held that ‘drilling and producing operations carried on in a careful and prudent manner and in keeping with applicable rules and regulations cannot be unnecessary damages since these activities are required to accomplish the legitimate drilling and producing objective.’ Relying on this legal position which was the issue framed by the parties for the evidentiary hearing, Petitioner did not introduce any rebuttal evidence on the harm to the ecology, (elk, bear and bobcat) claimed by the DNR and intervenor.” Petition, p 24-25.

Reduced to its essentials, Michigan Oil’s argument is that to its detriment, it relied upon Michigan Attorney General Opinion 4718 and was, thus, unconstitutionally lulled into presenting no rebuttal testimony to the state’s evidence establishing damage to wildlife and the environment.[8]

Michigan Oil’s attack is without foundation. Opinion 4718 provided broad legal responses to broad questions of legal policy.[9] What constitutes “unnecessary waste or destruction” is, by its very nature, determined by the facts of each particular permit application. The Opinion concluded:

[8]

Surely, Petitioner Michigan Oil is not claiming that it had detrimentally relied *at the contested case* hearings on a ruling by the hearing examiner in his Conclusions of Law issued more than seven and one half months after the close of the contested case hearings.

[9]

Opinion 4718 was issued one year before Michigan Oil’s application to drill on Corwith 1-22 and two years before the contested administrative hearings.

"To the extent, however, that the applicant can effectively drill for and produce oil and gas from state leased land *without causing unnecessary damage to or destruction of the surface, soils, animal, fish or aquatic life, or unreasonably molesting, spoiling or destroying state owned land.* said applicant cannot be denied a permit to drill thereon." (Emphasis added) OAG, 1971-1972, No. 4718, p 28 (April 6, 1971).

In this matter, the Attorney General, representing the Department of Natural Resources, left no doubt on its specific legal position before the administrative hearings began:

"4. Separate the issues as to law and fact, and state the desired order of trial of said issues.

Does Act 61 of P.A. of 1939 authorize the supervisor to deny an application for a permit to drill a well where the record indicates that unnecessary damage or destruction may be committed to the soils, animal, fish or aquatic life or property (including natural resources)? Legal issue.

Will the drilling of a well at the location specified in the application of the Michigan Oil Company cause unnecessary damage to animals, fish, aquatic values or property (including natural resources)? Factual issue.

The factual issue should be tried first." DNR December 21, 1972 Pretrial Statement to Hearing Examiner.

The whole point of the administrative hearing was, of course, Michigan Oil's challenge to Supervisor's July 21, 1972 denial of the second Corwith 1-22 application, which stated:

"Oil and gas operations at the above site cannot be conducted without causing or threatening to cause serious damage to animal life and molesting or spoiling state-owned lands. •••

The proposed drilling site is located in a 40-acre tract within a township about 93 percent state owned and hence almost entirely in a wild state. Similar conditions prevail in the townships to the north and south. This surrounding area is primitive in nature, largely wooded, with minimal development. The roads are narrow, winding, and highly scenic. *The proposed site is near the center of the Michigan elk range. The area has substantial populations of game—white-tailed deer, ruffed grouse, and woodcock, and relict populations of wildlife requiring extensive little-disturbed, wild areas such as black bears, bobcats, bald eagles, pileated woodpeckers, and ravens. All of the latter are scarce or very local in occurrence in the Lower Peninsula. . . .* (Emphasis added.)" (App A, A4, A5).

The truth of the matter is that Michigan Oil has unsuccessfully pursued its view of the Michigan Oil Conservation Act before the Natural Resources Commission, the Ingham Circuit Court, the Michigan Court of Appeals, and the Michigan Supreme Court. Michigan Oil, while alleging a violation of procedural due process, now asks this Court to impose its legal interpretation of the Michigan act on the State of Michigan. Michigan Oil's request should be denied.

CONCLUSION

Respondents Natural Resources Commission and Supervisor of Wells urge that this Court deny Michigan Oil's Petition for Writ of Certiorari to the Supreme Court of the State of Michigan.

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Dated: OCT 22 1979

APPENDIX

5/May, 1978

STATE OF MICHIGAN
SUPREME COURT

MICHIGAN OIL COMPANY,
A Michigan Corporation,
Petitioner-Appellant,

v

NATURAL RESOURCES
COMMISSION and SUPERVISOR
OF WELLS,

Defendant-Appellees,

and

PIGEON RIVER COUNTRY
ASSOCIATION,

Intervenor-Appellee

No. 59088

BEFORE THE ENTIRE BENCH
KAVANAGH, J (To affirm)

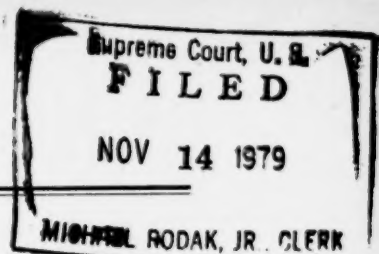
I would affirm the Court of Appeals.

I cannot subscribe to a construction of the Oil Conservation Act which would limit the DNR's duty to protect the whole environment as it is affected by the drilling of oil wells.

There is adequate evidentiary support for the Commission's determination that drilling the proposed well would result in damage to animal life.

Its conclusion that this amounts to the waste included in the proscription of the statute comports with my understanding of the legislative intent in writing this law. While it is true the express, primary concern of the Oil Conservation Act is with the prevention of waste of oil itself, I cannot read the Act as ignoring, let alone approving, all incidental damage to other natural resources.

Thomas Giles Kavanagh /s/



IN THE
Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-476

MICHIGAN OIL COMPANY, A MICHIGAN CORPORATION,
Petitioner,

vs.

NATURAL RESOURCES COMMISSION AND SUPERVISOR
OF WELLS AND PIGEON RIVER COUNTRY
ASSOCIATION,

Respondents.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF MICHIGAN**

BRIEF IN OPPOSITION

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

BRIEF IN OPPOSITION

OPINIONS BELOW

Petitioner's Appendix omits the concurring opinion of Justice Kavanagh in the Michigan Supreme Court decision. *Michigan Oil Co. v. Natural Resources Commission*, 406 Mich. 1, 34 (1979). See Petitioner's App. A.¹ This opinion is reprinted in the Appendix to the Natural Resources Commission's Brief in Opposition.

¹ Citations are to the Petitioner's Appendix.

QUESTIONS PRESENTED

This case involves no substantial federal question and turns on state court interpretation of state statutes, decided against Petitioner at four levels of administrative and judicial review.

STATEMENT OF THE CASE²

This case arises from a business gamble that Petitioner made and lost. In 1968, the State of Michigan sold oil and gas leases covering over one-half million acres on state lands in Michigan's northern lower peninsula at an average price of \$2.60 per acre. Nearly 60,000 of these acres are in the Pigeon River Country State Forest. The Forest is the last wild, undeveloped large area in the lower peninsula. It is the home of many species of wildlife, including elk, bear, bobcat, beaver, woodcock, eagle and osprey.

The lease sale contemplated that the state would subsequently determine whether or not to grant permits to drill for oil and gas on the leased land. Granting these permits required the Department of Natural Resources (DNR) to find as a matter of fact under the Michigan Oil Conservation Act, Mich. Comp. Laws §319.1 *et seq.*, that "waste" would not result from drilling operations.

In the lands covered by the lease sale, some permits were granted and some were denied. One of the permits that was denied in 1971 was for a 40-acre site in Corwith Township, Otsego County, under

² Petitioner relies on several "facts" in its Petition that are completely irrelevant to this Court's review of the Petition. Refusal by the Michigan Department of Natural Resources (DNR) to extend Petitioner's lease following denial of Petitioner's Motion for Rehearing before the Michigan Supreme Court is not part of the record in the instant proceeding. See App. N, pp. A192-A193. This refusal, at most, is the subject of a separate action by Petitioner. Second, the list of "well activity", App. M, pp. A187-A191, is extra-record matter. Third, the map reproduced between pages 22 and 23 of the Petition is similarly not found anywhere in the record and, in any event, does not illuminate any matters at issue in this proceeding.

Lease No. 9686 (App. L), then owned by Petitioner's predecessor in interest.

This permit was denied because drilling at the site would cause "waste" prohibited by the Oil Conservation Act. This denial was not appealed.

Petitioner, because this permit was denied, bought an interest in the lease under a "farm-out agreement." Under this agreement, Petitioner would receive an assignment of the lease if it could obtain a drilling permit from the state and if it could drill a commercial producing well at the 40-acre site known as Corwith 1-22.

Petitioner gambled that "waste" under the Oil Conservation Act would be interpreted in Petitioner's favor and the state would issue a drilling permit. The DNR denied Petitioner's application for a permit because the Oil Conservation Act prohibited the DNR from issuing a permit if "waste" would result. Respondent Pigeon River Country Association intervened at the subsequent hearing before the DNR to oppose Petitioner's application for a drilling permit.

The DNR's interpretation of the Oil Conservation Act was affirmed by every Michigan court to which Petitioner appealed. These courts declared, solely as a matter of state law, that Petitioner had speculated that the Oil Conservation Act would be interpreted in its favor when it entered into the farm-out agreement. Petitioner's gamble presents an interesting question of the interpretation of "waste" under state law, but involves constitutionally insignificant issues.

REASONS FOR DENYING THE WRIT

The Writ should be denied because this case presents no substantial federal question. The decision of the Michigan Supreme Court rests on an interpretation of the Michigan Oil Conservation Act and the Michigan Department of Conservation Act, Mich. Comp. Laws §299.1 *et seq.*, which require a showing in a proceeding to

obtain an oil drilling permit that no "waste" will occur. That interpretation is binding on this Court. *Adderley v. Florida*, 385 U.S. 39, 46 (1966).

The Supervisor of Wells denied Michigan Oil's application to drill on the Corwith 1-22 site in the Pigeon River Country State Forest. He found, as a matter of state law, that "waste" would occur since the proposed drilling would seriously damage animal life as well as spoil surrounding state lands. The Michigan Natural Resources Commission (NRC), the Ingham County Circuit Court, the Michigan Court of Appeals and the Michigan Supreme Court all affirmed the denial on the ground that Petitioner had not complied with the Michigan Oil Conservation and Department of Conservation Acts. The only disagreement in the Michigan courts was over the interpretation of "waste". These court decisions under the Oil Conservation Act and the Department of Conservation Act rested on an adequate and independent state ground. This Court will not review a state court decision which is based on an adequate, independent state ground. *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945).

A. Denial of a Drilling Permit Is Not an Unconstitutional Taking of Property.

Michigan Oil has no property interest cognizable under the Fifth and Fourteenth Amendments to the Constitution.³ Its interests under the lease were entirely contingent upon the grant of a drilling permit by the state. Michigan Oil obtained its potential future interests in the lease in a "farm-out agreement" with express

³ Petitioner makes the extraordinary claim (Petition p. 17; App. N, pp. A192-A193) that the DNR's refusal to extend the lease (subsequent to the denial of rehearing by the Michigan Supreme Court) is retrospectively incorporated in its property interest that is claimed to be taken. The lease expired by its own terms in 1978. The most that Petitioner can challenge in this Court is the decision of the Michigan Supreme Court. But the DNR's decision not to extend the lease is not part of the judgment sought to be reviewed, as well as not being part of the record below.

knowledge that the state had denied a drilling permit to Michigan Oil's predecessor in interest. The farm-out agreement provided that Michigan Oil would receive an assignment of the lease upon the condition precedent that the state would issue a drilling permit.

Petitioner's interest is a non-freehold contingent future interest based on the exercise of the state's police power and a gamble that the courts would interpret "waste" under state law favorably to Petitioner. The Ingham County Circuit Court found:

"Indeed, Mr. Orr, President of Michigan Oil, testified that he learned of the State Corwith in question through his capacity as a member of the Oil and Gas Advisory Board of the Supervisor of Wells (Tr. 215), and he further testified that he knew of the prior refusals of a permit when Michigan Oil purchased the lease (Tr. 217) and indeed it was purchased *because* a permit had previously been denied (Tr. 217). In other words, Michigan Oil took a chance and lost." App. F, p. A104 (emphasis in original)

Michigan Oil entered the transaction with specific knowledge that the state had authority to deny drilling permits at particular sites.

Michigan Oil has no vested rights in a drilling permit, since the DNR has an express statutory duty to deny a permit upon a finding that the drilling would cause unnecessary damage to the environment by "surface waste". Mich. Comp. Laws §§319.23, 319.2(1)(2) (defining "waste"). If such a finding is made, no drilling permit comes into existence. Thus, the very thing that Petitioner claims to be a property right is conditioned upon an exercise of the police power.

The lease by its terms does not grant a vested right to drill:

"'H' This lease shall be subject to the rules and regulations of the Department of Conservation now or hereafter in force relative to such leases, all of which rules and regulations are made a part and condition of this lease;"

App. L, p. A186

This fact distinguishes *Mobil Oil Corp. v. Kelley*, 353 F. Supp. 582 (S.D. Ala. 1973), cited by Petitioner at p. 17, in which the subject lease granted a right to drill. *Id.* at 585. Likewise *Union Oil Co. of California v. Morton*, 512 F.2d 743 (9th Cir. 1975), relied on by Petitioner at p. 16, is distinguishable because the lease there conferred vested rights. *Id.* at 750.

Michigan Oil had no "reasonable expectations" in a compensable property interest. This Court stated the applicable principle in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124-125 (1978):

"[T]his Court has dismissed 'taking' challenges on the ground that, while the challenged government action caused economic harm, it did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes."

There is no constitutionally recognized "reasonable expectation" in a reasonable exercise of the police power. If Michigan Oil bought anything, it bought an investment speculation that the state would exercise the police power in its favor or that the state courts would interpret state law favorable to it. That risk is the nature of Petitioner's business. Michigan Oil cannot claim that there was a taking, since there was no loss.

Petitioner's reliance on *United States v. Causby*, 328 U.S. 256 (1946), is totally inapposite. *Causby* turned on the physical appropriation of the landowner's property. *Causby* and the associated inverse condemnation cases all deal with physical invasion of property and an easement taken for that intrusion. The regulation involved here in no way contemplates or imposes such an easement.

B. Denial of a Drilling Permit Is Not an Unconstitutional Impairment of Contract.

Michigan Oil claims that the DNR's refusal to issue a drilling permit on Corwith 1-22 is an impairment of contractual obligations

in violation of U.S. Const. Art. I, §10. But Michigan Oil has no rights under the state lease until it obtains a drilling permit. Michigan Oil has no contract that provides that it will receive a drilling permit. There is no contract in this case that is violated by state action.

The contract rights held by Petitioner were acquired expressly subject to state law (Para. H of the Lease, App. L, p. A186) which required denial of the drilling permit to prevent waste or destruction of the state's resources. The Contract Clause "does not operate to obliterate the police power of the States". *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 (1978). Petitioner has never denied that the DNR's denial of its drilling permit was a necessary exercise of the police power under Michigan law. The state cannot enter a contract with Petitioner to exercise the police power favorably to Petitioner.

C. Denial of a Drilling Permit Did Not Deny Petitioner Equal Protection Under the Law.

Petitioner's equal protection claim is as insubstantial as its takings and contract impairment claims.⁴ Petitioner attempts to show that the DNR was obligated to issue all drilling permits in the Pigeon River State Forest area once it had issued one permit. But the question is one of fact whether "waste" will occur at any particular drilling site. Having granted any oil drilling permits in the Pigeon River State Forest area, the DNR could use any knowledge gained about "waste" caused by this earlier drilling to deny future permits. The DNR's denial of a drilling permit to Petitioner was a legitimate exercise of the police power that meets the minimum standard of "rationality". *City of New Orleans v. Dukes*, 427 U.S. 297 (1976); *Railway Express Agency v. City of New York*, 336 U.S. 106 (1949).

⁴ Petitioner has manufactured an extra-record diagram (Petition, pp. 22-23) and *ex parte* facts (App. M) to inflate its equal protection claim.

D. Michigan Oil Was Not Denied Due Process By the Natural Resources Commission Ruling That "Unnecessary" Damage Under the Oil Conservation Act Included Damage to the Environment.

Petitioner claims that it was denied due process because it had no notice that "unnecessary" damage under the Oil Conservation Act included damage to the environment. Petitioner claims it was therefore precluded from offering rebuttal evidence on this issue. Petitioner's claim is disingenuous, since Petitioner specifically argued at length at the hearing before the DNR examiner that drilling under the permit would not cause environmental damage. App. J, p. 121.

Michigan Oil is barred from raising this due process claim in its Petition. The Petitioner's Statement of Facts nowhere shows where this question was timely and properly raised in the state courts to preserve the question for Supreme Court review. Sup. Ct. R. 23(1)(f).

Petitioner waives federal claims if they are not preserved at the first opportunity in state court proceedings. The Petition implicitly admits (Petition p. 24) that Petitioner's first opportunity to raise the issue of notice was in the Ingham County Circuit Court on appeal from the NRC ruling. But Petitioner neglected to raise this due process and notice claim until it filed its Petition for Rehearing before the Michigan Supreme Court. See App. C, pp. A49-A52.

Finally, Petitioner's claimed inability to submit rebuttal evidence is refuted by the facts. Michigan Oil put on a purported wildlife expert, Dr. Manthy, to testify regarding the impact of drilling on wildlife. See App. J, pp. A148-A149, A165. Petitioner can hardly now be heard to say that it did not have an opportunity to rebut the DNR's evidence that the drilling at Corwith 1-22 would damage the environment.

CONCLUSION

None of the constitutional claims asserted in the Petition present a substantial federal question. For the foregoing reasons, Respondent Pigeon River Country Association requests that this Court deny Michigan Oil's Petition for Writ of Certiorari to the Supreme Court of the State of Michigan.

Respectfully submitted,

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